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No. 10

In the Supreme Court of the United States

MICHAEL T. NERAD,
Senior Airman, United States Air Force,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Article 66(c) of the Uniform Code of Military Justice authorizes the Courts of Criminal Appeals (the military justice system's intermediate appellate courts) to set aside convictions on discretionary grounds other than legal error. Article 67(c) provides that the Court of Appeals for the Armed Forces "may act only with respect to the findings . . . as . . . affirmed or set aside as incorrect in law by the Court of Criminal Appeals." The question presented is:

Did the Court of Appeals for the Armed Forces exceed its statutory jurisdiction when it reversed a Court of Criminal Appeals decision that set aside a finding of guilty on a basis other than being "incorrect in law"?

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PETITION FOR WRIT OF CERTIORARI

Senior Airman Michael T. Nerad, United States Air Force, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App. 1a-48a) is reported at 69 M.J. 138. The order of the United States Court of Appeals for the Armed Forces denying Petitioner's motion to dismiss (App. 49a-50a) is reported at 68 M.J. 205. The opinion of the United States Air Force Court of Criminal Appeals (App. 51a-64a) is reported at 67 M.J. 748. The order of the United States Air Force Court of Criminal Appeals denying reconsideration and reconsideration en banc (App. 65a-66a) is unreported.

JURISDICTION

The Court of Appeals for the Armed Forces' judgment was entered on July 27, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

STATUTES INVOLVED

Articles 66 and 67 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 866, 867, are set out in Appendix E.

STATEMENT

This case concerns the statutory limitations that Congress placed on the authority of the Court of Appeals for the Armed Forces (CAAF) when reviewing certain intermediate military appellate court decisions.

1. Petitioner, a senior airman in the United States Air Force, was charged with a variety of court-martial offenses. App. 2a. Four of them—consensual sodomy, possession of child pornography, adultery, and an order violation—involved Appellant's conduct with Ms. GL, a 17 year old with whom he was having a consensual extramarital affair. The child pornography offense arose from his possession of sexually explicit images of his paramour (some including sex acts involving the two of them) that she had e-mailed to him. At a general court-martial, Petitioner pleaded guilty to various charges, including the four involving Ms. GL. *See* App. 52a, 58a. He was convicted of the offenses to which he pleaded guilty and sentenced to a dishonorable discharge, confinement for twelve months, forfeiture of all pay and allowances, a reprimand, and reduction to the lowest enlisted rank. App. 52a.

2. The Air Force Court of Criminal Appeals set aside and dismissed the child pornography

conviction while affirming the remaining convictions and the sentence. App. 51a-64a. Although the Air Force Court concluded that Petitioner "was technically in violation of the prohibitions on child pornography," he "was in the unique position of having a relationship with someone he could legally see naked and, but for his existing marriage, legally have sex with, but could not legally possess nude pictures of her that she took and sent to him." App. 58a. Using its statutory authority to set aside findings of guilty for reasons other than legal error, the Air Force Court dismissed the child pornography conviction because it "unreasonably exaggerates the criminality of his conduct." App. 63a. After the Air Force Court denied the United States' motion for reconsideration and reconsideration en banc, App. 65a-66a, the Judge Advocate General of the Air Force certified the case for review by CAAF.

3. Petitioner moved to dismiss the certification because the UCMJ precludes CAAF from acting with respect to a finding of guilty that a Court of Criminal Appeals neither affirmed nor set aside as incorrect in law. CAAF summarily denied that motion. App. 49a-50a.

4. Upon plenary review, CAAF set aside the Air Force Court's decision and remanded the case for further review. App. 28a. The majority opinion addressed Petitioner's jurisdictional challenge. Article 67(c) of the UCMJ provides that CAAF "may act only with respect to the findings . . . as . . . affirmed or set aside as incorrect in law by the Court of Criminal Appeals." 10 U.S.C. § 867(c) (2006). Nevertheless, CAAF concluded that it had the

authority to set aside the Air Force Court's reversal of the child pornography conviction, reasoning:

> In *United States v. Leak*, 61 M.J. 234 (C.A.A.F. 2005), we observed that this Court, since the early days of the UCMJ, has reviewed lower court decisions under Article 67(a)(2), UCMJ, for compliance with the law, and we have not confined corrective action to those cases found by the lower court to be "incorrect in law." *See id.* at 239-42; *see also* [*United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001)] (rejecting a factor the CCA used in conducting the unreasonable multiplication of charges analysis and remanding for the CCA to apply the correct factor); *United States v. Thompson*, 2 C.M.A. 460, 464, 9 C.M.R. 90, 94 (1953) (reversing a CCA's factual sufficiency determination because it misapprehended the legal elements of the offense, and remanding for the CCA to conduct a new factual sufficiency review using the appropriate elements). Rather, the power to review a case under Article 67(a)(2), UCMJ, includes the power to order remedial proceedings, such as a remand, to ensure that the lower court reviews the findings and sentence approved by the convening authority in a manner consistent with a "correct view of the law." *See Leak*, 61 M.J. at 242 (citation and quotation marks omitted).

App. 24a-25a.

The majority proceeded to analyze the Air Force Court's reversal of the child pornography conviction. CAAF found that it could not discern the basis on which the Air Force Court exercised its Article 66(c) authority. App. 25a-26a. CAAF concluded that if the Air Force Court set aside the conviction as a matter of clemency, on equitable grounds, or because it believed prosecutorial discretion should not have been exercised to pursue the charge, it acted improperly. App. 23a. But CAAF also suggested, without expressly holding, that it would be permissible for the Air Force Court to set aside the conviction if it "identif[ied] tangible factors, either by reference to other charges in the case or by reference to other cases, that led it to conclude that the finding 'unreasonably exaggerate[d] the criminality of' the conduct, or any factor that caused the charge, albeit lawful, to constitute an abuse of prosecutorial discretion." App. 25a-26a (internal citations omitted).

Judge Baker concurred in the result, but did not address the jurisdictional issue. App. 27a-28a. While suggesting that the Air Force Court had impermissibly acted as a matter of clemency, he supported remanding the case to the Air Force Court "to explain its reasoning." App. 28a.

Judge Stucky dissented. App. 28a-48a. He "agree[d] with the majority that we have jurisdiction over this case." App. 30a. However, he would have ordered the child pornography conviction reinstated on the ground that the Air Force Court had no authority to set aside a legally and factually sufficient finding of guilty. App. 48a.

REASONS FOR GRANTING THE PETITION

CAAF violated a clear congressional limitation on its jurisdictional authority. Without explaining how its action could be reconciled with the plain language of its jurisdiction-granting statute, CAAF justified its approach by observing that it has taken similar actions in the past. That is true. But running through a red light is not justified by having made a habit of doing so. The reality that CAAF has often exceeded its statutory jurisdiction makes this case more certworthy. Certiorari is appropriate to assess CAAF's pattern of doing that which the plain language of its jurisdiction-granting statute forbids.

This Court does not often issue writs of certiorari to CAAF. But the two most recent plenary reviews of CAAF decisions have both concerned claims by the United States that CAAF exceeded its statutory jurisdiction. *United States v. Denedo*, 129 S. Ct. 2213 (2009); *Clinton v. Goldsmith*, 526 U.S. 529 (1999). While this Court upheld CAAF's exercise of jurisdiction in the more recent of the two cases, Petitioner agrees with the United States' assertion that CAAF has issued a long line of cases "expand[ing] its role beyond its congressionally prescribed jurisdiction." Petition for Writ of Certiorari at 24, *United States v. Denedo*, 129 S. Ct. 2213 (2009) (No. 08-267), 2008 WL 5693433 [hereinafter *Denedo* Certiorari Petition]. Granting review is appropriate to return CAAF to its statutorily prescribed jurisdictional limits.

I. CAAF has no jurisdiction to act with respect to a finding of guilty that was set aside and dismissed by a Court of Criminal Appeals on a ground other than legal error

As an Article I court, CAAF is strictly limited to the jurisdiction Congress gave it. Congress limited CAAF to acting only with respect to findings of guilty that were either affirmed by a Court of Criminal Appeals or set aside by a Court of Criminal Appeals as incorrect in law. The finding of guilty to the child pornography offense was neither affirmed by the Air Force Court of Criminal Appeals nor set aside as incorrect in law. CAAF, therefore, was statutorily forbidden from acting with respect to that finding. CAAF erred by nevertheless setting aside the Air Force Court of Criminal Appeals' decision with respect to the child pornography offense and remanding the case for further consideration of that offense.

A. Article 67(c)'s plain language forbids CAAF from acting with respect to findings that a Court of Criminal Appeals set aside on a basis other than legal error

Article 67(c)'s plain language states that CAAF may not act with respect to a finding of guilty that was set aside by a Court of Criminal Appeals on a ground other than legal error. Article 67(c) provides that "[i]n any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by

the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." Art. 67(c), UCMJ, 10 U.S.C. § 867 (2006). This case fell outside that congressional grant of authority.

The child pornography conviction was neither "affirmed" nor "set aside as incorrect in law." *Id.* On the contrary, the Air Force Court expressly noted that "we find no legal error." App. 59a. The CAAF majority did not dispute that the Air Force Court set aside the conviction on a ground other than legal error. Nor did the majority dispute that the Air Force Court possesses legal authority to set aside convictions on grounds other than legal error. While the majority questioned whether the Air Force Court acted on a proper basis in exercising its power to set aside a finding on a ground other than legal error, Article 67(c) plainly precluded CAAF from taking any action with respect to the child pornography conviction. Article 67(a)(2) required CAAF to review the record upon certification by the Judge Advocate General of the Air Force. 10 U.S.C. § 867(a)(2) (2006). But Article 67(c) jurisdictionally precluded CAAF from acting with respect to the child pornography offense because the Air Force Court had set aside that conviction on a basis other than legal error.

B. CAAF's precedent cannot expand Article 67(c)'s plain language

In neither its order denying Petitioner's motion to dismiss (App. 49a-50a) nor its opinion below (*see* App. 24a-25a) did CAAF analyze the plain language

of its jurisdiction-granting statute. Instead, CAAF concluded it had jurisdiction to rule as it did by applying its divided opinion in *United States v. Leak*, 61 M.J. 234 (C.A.A.F. 2005), which did include a textual analysis of Article 67(c). *See* 24a-25a. Because the lower court relied on *Leak* to attempt to establish its jurisdiction, a detailed analysis of *Leak* is necessary.

Leak was a 4-1 opinion in which the majority and Chief Judge Gierke's dissent differed over a jurisdictional question. In *Leak*, the Army Court of Criminal Appeals had exercised its Article 66(c) power to set aside a rape conviction because the evidence was factually insufficient and instead affirmed a finding of guilty to the lesser included offense of indecent assault. *United States v. Leak*, 58 M.J. 869 (A. Ct. Crim. App. 2003). The Court of Appeals for the Armed Forces found that the Army Court's rationale for concluding that the evidence was factually insufficient to constitute rape was "susceptible to two interpretations, one correct in law and the other not." *Leak*, 61 M.J. at 248. The majority set aside the Army Court's decision and remanded the case for further consideration. *Id.* at 249. Chief Judge Gierke dissented, pointing to Article 67(c)'s language that "[i]n any case reviewed by it," CAAF "may act only with respect to the findings and sentence . . . *as affirmed or set aside as incorrect in law by the Court of Criminal Appeals*." *Id.* at 249 (Gierke, C.J., concurring in part/dissenting in part) (quoting 10 U.S.C. § 867(c)) (emphasis supplied by Gierke, C.J.). Chief Judge Gierke concluded that under Article 67(c)'s plain language, "in a case where a Court of Criminal Appeals sets

aside a finding on factual insufficiency grounds, rather than on legal grounds, we have no power to 'act' on that finding. Such a ruling of the Court of Criminal Appeals is final." *Id.*

The *Leak* majority observed that Article 67(c)'s plain language could be construed to mean that when a Court of Criminal Appeals sets aside a finding using its special Article 66(c) powers rather than because the conviction is "incorrect in law," "this Court is without authority to 'act.'" 61 M.J. at 239. That is, indeed, the plain meaning of Article 67(c)'s text. But the *Leak* majority then proposed an alternative way CAAF's jurisdiction-granting statute "might be read." *Id.* The majority said that Article 67(c)'s final sentence—which provides that CAAF "shall take action only with respect to matters of law"—"might be read narrowly to *require* this Court to take action in all certified cases with respect to matters of law." *Id.* Having created an ambiguity with this implausible interpretation of Article 67(c)'s final sentence, the *Leak* majority proceeded to use extratextual sources to support a construction of Article 67(c) that was far broader than its plain language.

Even if the *Leak* majority's alternative reading of Article 67(c)'s final sentence were plausible, the mere existence of a possible alternative reading would not justify resorting to extratextual sources. Rather, a court confronted with two differing interpretations of a statute must compare them to determine whether one is "more natural" than the other. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias*, 128 S. Ct. 2326, 2332 (2008). If the law were otherwise—if any possible alternative reading

of a statute were sufficient to create an ambiguity justifying resort to extratextual sources—then a statute's plain language would lose its primacy in the statutory construction process. It would be the rare case in which a court seeking to construe its own powers expansively could not identify some alternative manner in which a statute "might be read." *Leak*, 61 M.J. at 239. Statutes' plain language will continue to be the primary focus of statutory construction only if resort to extratextual sources is limited to instances where two alternative interpretations of a statute are both facially reasonably plausible. Article 67(c)'s plain language, however, permits only one plausible interpretation.

Article 67(c) begins by expressing a limitation on CAAF's authority: "In any case reviewed by it," CAAF "may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." Art. 67(c), UCMJ, 10 U.S.C. § 867(c). This language establishes that CAAF may "act" only on certain findings: those approved by the convening authority and affirmed or set aside as incorrect in law by the Court of Criminal Appeals. Article 67(c) thus forbids CAAF from "act[ing]" on findings disapproved by the convening authority or set aside by a Court of Criminal Appeals on a basis other than being "incorrect in law."

Article 67(c)'s next sentence provides that "[i]n a case which the Judge Advocate General orders sent to" CAAF, "that action need be taken only with respect to the issues raised by him." *Id.* That sentence's reference to "that action" clearly refers to the previous sentence's use of the word "act," which

is limited to findings that a Court of Criminal Appeals has either affirmed or set aside as incorrect in law. The second sentence does not expand the first sentence's authorization to act; rather, it addresses the scope of CAAF's review in executing the authority provided by the first sentence.

Article 67(c)'s third sentence is similar: "In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review." *Id.* Once again, "that action" clearly refers to Article 67(c)'s first sentence's limited authority to "act."

Article 67(c)'s final sentence provides that CAAF "shall take action only with respect to matters of law." *Id.* This sentence is another limitation on CAAF's authority to act. It uses the same word, "action," that the previous two sentences use. Congress no doubt intended that word to have the same meaning in Article 67(c)'s fourth sentence that it has in Article 67(c)'s second and third sentences. *See Comm'r v. Keystone Consol. Indust.*, 508 U.S. 152, 159 (1993) ("It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks and citation omitted)). Article 67(c)'s fourth sentence cannot plausibly be read as a grant of additional authority beyond that provided by the section's first sentence. Indeed, to read the fourth sentence as allowing CAAF to act on a finding that a Court of Criminal Appeals set aside on a basis other than being "incorrect in law" would be flatly inconsistent with Article 67(c)'s first sentence. Surely Congress did not include two mutually inconsistent sentences

within a single section of a UCMJ article. *See, e.g.*, *Freeman v. Gonzales*, 444 F.3d 1031, 1039 (9th Cir. 2006) (observing that courts "should interpret statutes to be coherent and internally consistent").

Even absent Article 67(c)'s second and third sentences, Article 67(c)'s final sentence would clearly convey a limitation on CAAF's authority, not a requirement that it take certain actions. The alternative way that *Leak* suggests Article 67(c)'s final sentence "might be read" is "to *require* this Court to take action in all certified cases with respect to matters of law." 61 M.J. at 239. But that interpretation of the sentence is hardly "natural" because of its use of the word "only." *See Fla. Dep't of Revenue*, 128 S. Ct. at 2332. When used as an adverb, "only" is synonymous with "solely" and "exclusively." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1577 (2002). Substituting one of these synonyms for "only," Article 67(c)'s final sentence would read, "The Court of Appeals for the Armed Forces shall take action solely with respect to matters of law." This language is a limitation on the kinds of actions that CAAF may take, not an edict that it must take certain kinds of actions.

A comparison of Article 66(c) with Article 67(c) reaffirms that plain language interpretation. Article 66(c) gives the Courts of Criminal Appeals unusually broad powers. A Court of Criminal Appeals "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(c). Article 66(c)'s final sentence authorizes the Courts of Criminal Appeals to exercise an unusually

robust standard of review: they "may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." *Id.* The obvious purpose of Article 67(c)'s final sentence, which states that CAAF "shall take action only with respect to matters of law," is to make clear that CAAF does not have the same broad powers that Congress gave to the Courts of Criminal Appeals. The *Leak* majority's view that that sentence can be read as broadening CAAF's authority rather than limiting it is thus inconsistent not only with the sentence's plain language, but also with Congress's entire statutory scheme for military appellate review.

As Chief Judge Gierke indicated in his *Leak* dissent, the only plausible reading of Article 67(c) is the first possible reading suggested by the *Leak* majority: that where a Judge Advocate General certifies an issue concerning a finding set aside by a Court of Criminal Appeals on a basis other than being "incorrect in law," CAAF has "no statutory authority to 'act.'" 61 M.J. at 249 (Gierke, C.J., concurring in part/dissenting in part). Article 67(c)'s plain language thus precluded CAAF from setting aside the Air Force Court's reversal of Petitioner's child pornography conviction.

Even if there were two facially plausible interpretations of Article 67(c), CAAF should have applied the canons of statutory construction "as a means of choosing between them." *Clark v. Martinez*, 543 U.S. 371, 384 (2005) (emphasis removed) (applying canon of constitutional avoidance). "[E]stablished principles of statutory

construction mandate . . . a narrow interpretation of' an Article I court's jurisdiction-granting statute. *Bowen v. Massachusetts*, 487 U.S. 879, 908 n.46 (1988) (quoting *Delaware Div. of Health & Social Services v. Dep't of Health & Human Services*, 665 F. Supp. 1104, 1117-18 (D. Del. 1987)). An Article I court "is a court of limited jurisdiction, because its jurisdiction is statutorily granted and it is to be strictly construed." *Id.* (quoting *Delaware Div. of Health & Social Services*, 665 F. Supp. at 1118); *see also Goldsmith*, 526 U.S. at 535 ("the CAAF's independent statutory jurisdiction is narrowly circumscribed"); *Denedo*, 129 S. Ct. at 2221 ("[I]t is for Congress to determine the subject-matter jurisdiction of federal courts. . . . This rule applies with added force to Article I tribunals, such as the NMCCA and CAAF, which owe their existence to Congress' authority to enact legislation pursuant to Art. I, § 8 of the Constitution."). Under the "established principle[] of statutory construction" mandating a "narrow interpretation" of Article 67(c)'s jurisdictional grant, *see Bowen*, 487 U.S. at 908 n.46, CAAF should have adopted the narrower of two potential interpretations of Article 67(c). Under that narrower interpretation, CAAF had no authority to act on a finding that a Court of Criminal Appeals set aside on a basis other than being "incorrect in law."

In direct contravention of that principle, the *Leak* majority opined that "we believe it axiomatic that Article 67 must be interpreted in light of the overall jurisdictional concept intended by the Congress, and not through the selective narrow reading of individual sentences within the article."

Leak, 61 M.J. at 239. The *Leak* majority then reviewed the UCMJ's legislative history. Nothing in that legislative history, however, supports the conclusion that Congress intended to grant CAAF power to act where a Court of Criminal Appeals set aside a finding of guilty on a basis other than legal error. First, the *Leak* majority quoted an identical portion of both the House and Senate Armed Services Committees' 1949 reports on what would become the UCMJ:

> The Court of Military Appeals [as CAAF was originally known] takes action only with respect to matters of law .... It may act only with respect to the findings and sentence as approved by the convening authority. If the Board of Review [one of the Courts of Criminal Appeals' predecessors] has set aside a finding as against the weight of the evidence *this* decision cannot be reconsidered by the court. If, on the other hand, the Board has set a case aside because of the improper introduction of evidence or because of *other prejudicial error,* the Court of Military Appeals may reverse if it finds there has been no such error.

H.R. REP. NO. 81-491 at 32 (1949) (emphasis added by CAAF); S. REP. NO. 81-486 at 29 (1949) (emphasis added by CAAF). The *Leak* majority construed this language as suggesting "that with respect to findings of factual insufficiency, as long as a Judge Advocate General's certified question raises a legal issue other than a complaint as to the manner in which the

lower court weighed the evidence, this Court shall review that claim." 61 M.J. at 240. That meaning, however, hardly seems apparent in the quoted language.

The *Leak* majority continued, "Further, the legislative history indicates that Congress contemplated that this Court and not the lower courts would decide whether a claim presents a question of law or fact, and that with respect to questions of law, this Court would determine whether the lower court engaged in an erroneous application of the law." *Id.* (citing *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services,* 81st Cong. 609 (1949) (statement of Prof. Edmund M. Morgan Jr., Chairman of UCMJ drafting committee)). That uncontroversial principle is irrelevant to this case because there is no question that the Air Force Court set aside and dismissed Petitioner's child pornography conviction on a basis other than being incorrect in law. Neither the CAAF majority nor either of the separate opinions contended otherwise. So CAAF's authority to review a legal ruling that a Court of Criminal Appeals mischaracterizes as an exercise of its special Article 66(c) authority is not implicated here.

That is the extent of the legislative history cited by the *Leak* majority. That legislative history does not support CAAF's authority to set aside the Air Force Court's opinion in this case, much less warrant departing from the most natural plain language interpretation of Article 67(c).

The *Leak* majority next turned to CAAF's own precedent. 61 M.J. at 240-41 (citing *United States v.*

Thompson, 2 C.M.A 460, 9 C.M.R. 90 (1953); *United States v. Bunting*, 6 C.M.A. 170, 19 C.M.R. 296 (1955)). This portion of the opinion demonstrated that CAAF had previously taken action where a board of review's decision was based on its unique Article 66(c) authority rather than on a finding of legal error. *Thompson*, however, did not even address Article 67's language limiting the Court of Military Appeals' authority to act, much less explain how it could be construed to allow the Court of Military Appeals to act with respect to a finding that a board of review had set aside as factually insufficient. *Bunting* advanced the unremarkable principle, discussed above, that "a board of review may not permissibly defeat review in this Court by labeling a matter of law, or a mixed holding of law and fact, as a question of fact." *Bunting*, 19 C.M.R. at 299, 6 C.M.A. at 173.

Finally, the *Leak* majority justified its action based on what it characterized as "the overall intent of Article 67—to grant this Court jurisdiction to decide matters of law raised by appellants or certified by Judge Advocates General." 61 M.J. at 242. The *Leak* majority fails to indicate where Congress manifested such an "overall intent" which, as discussed above, goes beyond Article 67's plain meaning. So neither *Leak* nor the authorities it cited provided a sound basis for concluding that Article 67(c) can fairly be interpreted as providing CAAF with jurisdiction to reverse a Court of Criminal Appeals' exercise of its expansive Article 66(c) authority.

Beyond *Leak* and *Thompson*, CAAF's *Nerad* opinion below cited only one authority in its

discussion of the jurisdictional issue: CAAF's decision in *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). In *Quiroz*, however, CAAF did not even cite Article 67(c), much less explain how it could be construed to allow CAAF to overturn a Court of Criminal Appeals' exercise of its unique authority under Article 66(c). *Quiroz* thus adds nothing to CAAF's jurisdictional analysis in *Nerad*, other than providing another instance in which CAAF exceeded its own jurisdictional limitations.

While Petitioner maintains it is unnecessary to consult Article 67(c)'s legislative history because the statutory language is plain, that legislative history includes an interpretation of Article 67 inconsistent with CAAF's conclusion below regarding its jurisdictional reach. In 1949, in his written statement to the Senate Armed Services Committee, Judge Advocate General of the Army Major General Thomas H. Green observed that if a board of review did precisely what the Air Force Court did in this case—decline to approve a finding of guilty under its unique Article 66(c) authority—the board's ruling "would be absolutely final. I could not appeal that case to the Court of Military Appeals because the board's determination would not be based on a question of law." *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of Senate Committee on Armed Services*, 81st Cong., 1st Sess. 258 (1949) (statement of Major General Green, Judge Advocate General of the Army). So Petitioner's plain language interpretation of Article 67(c) is not some anachronistic 21st Century construction of a 60-year-old statute; rather, a high-level Executive Branch official whose Department was directly

affected by the legislation made the same plain language interpretation when the bill adopting that language was before Congress in 1949.

II. The Question Presented is important and warrants this Court's review

Just as the United States asserted in its certiorari petition in *Denedo*, "This case concerns a matter of fundamental importance with respect to the authority of the military courts created by Congress." *Denedo* Certiorari Petition, *supra*, at 21. Granting review is appropriate to ensure that CAAF does not judicially expand the limited jurisdiction Congress gave it.

A. CAAF has engaged in a pattern of construing its jurisdiction-granting statute overbroadly

In its *Denedo* petition for certiorari, the United States noted a number of cases in which CAAF had exceeded its statutory authority. *Id.* at 24-25. One of those cases was *United States* v. *Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008), a 3-2 decision in which the majority held CAAF had jurisdiction to review decisions of the Courts of Criminal Appeals in interlocutory prosecution appeals despite the absence of any statutory language authorizing such review. Another was *Kreutzer* v. *United States*, 60 M.J. 453 (C.A.A.F. 2005), a 4-1 decision in which the majority held CAAF could issue a writ of mandamus to compel military corrections officials to change the petitioner's confinement status in apparent violation

of the jurisdictional limits recognized by *Clinton v. Goldsmith*, 526 U.S. 529 (1999). Other divided opinions in which CAAF has interpreted its jurisdictional authority overexpansively include *United States v. Leak*, 61 M.J. 234 (C.A.A.F. 2005), discussed above, and *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008), *cert. denied*, 130 S. Ct. 52 (2009), a 3-2 decision in which CAAF construed a statute authorizing interlocutory prosecution appeals of rulings excluding evidence to allow the prosecution to appeal a subpoena's quashal.

Even since announcing its decision in this case, CAAF has continued to expand its jurisdictional reach. Three weeks after issuing its opinion below, CAAF denied a motion to dismiss a certificate for review in which the Judge Advocate General of the Air Force sought reversal of an Air Force Court of Criminal Appeals decision reducing a court-martial sentence based on its unique Article 66(c) authority to affirm only "such part or amount of the sentence[] as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *United States v. Humphries*, __ M.J. ___, No. 10-5004/AF (C.A.A.F. Aug. 17, 2010) (order). The denial of that motion to dismiss was a departure from CAAF's previous interpretation of its appellate jurisdiction, which held that "[t]he exercise by a board of review of its discretionary and fact-finding function of determining the appropriateness of an adjudged sentence may not be utilized as a basis for creating a certified question reviewable by this Court." *United States v. Turner*, 15 C.M.A. 438, 439, 35 C.M.R. 410, 411 (1965). This jurisdictional

expansionism further suggests the appropriateness of granting certiorari.

In its decision below, as in a number of other cases, CAAF forayed beyond its jurisdictional boundaries. Just as the United States urged in its *Denedo* petition for certiorari, "This Court's intervention is warranted, once again, in order to confine the CAAF to its statutory jurisdiction." *Denedo* Certiorari Petition, *supra*, at 25.

B. Certiorari is appropriate despite this case's interlocutory posture

The importance of the Question Presented makes granting certiorari appropriate despite this case's interlocutory status. Granting certiorari now is particularly appropriate due to a unique limitation on this Court's certiorari jurisdiction over military justice cases. Even if the Air Force Court were to affirm Petitioner's child pornography conviction upon remand from CAAF, this unique jurisdictional limitation could prevent this case from returning to this Court.

This Court has granted certiorari to review jurisdictional challenges in other military justice cases despite their interlocutory nature, including at the United States' request in the recent *Denedo* case. Certiorari is similarly appropriate here to review the CAAF's decision on an important issue concerning the military appellate courts' jurisdiction.

This Court granted the United States' petition for certiorari in *Denedo* even though CAAF had remanded the case for further proceedings that might have resulted in the denial of former-Petty

Officer Denedo's petition for a writ of error coram nobis. *United States v. Denedo*, 129 S. Ct. 622 (2009). Similarly, in *Solorio v. United States*, this Court granted certiorari to review a subject-matter jurisdiction challenge to Petty Officer Solorio's court-martial even though the Court of Military Appeals (as CAAF was known at the time) had remanded the case for trial, which could have resulted in the petitioner's acquittal. *Solorio v. United States*, 476 U.S. 1181 (1986). Here, too, the question presented is sufficiently important to consider regardless of the possibility that Petitioner might obtain relief from the Air Force Court upon remand.

Another consideration supports exercising jurisdiction now despite the case's interlocutory status: this case might never again fall within this Court's certiorari jurisdiction even if the Air Force Court were to affirm Petitioner's child pornography conviction upon remand. This might be petitioner's only opportunity to ask this Court to review and correct CAAF's exercise of jurisdiction it did not possess.

Those tried by courts-martial may be the only criminal defendants in the United States who do not have a guaranteed path to this Court upon conviction. *See* Bennett Boskey & Eugene Gressman, *The Supreme Court's New Certiorari Jurisdiction Over Military Appeals*, 102 F.R.D. 329, 337 (1984). Before enactment of the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, this Court had no certiorari jurisdiction over direct appeals of court-martial convictions. *See* Boskey & Gressman, *supra*, 102 F.R.D. at 329. But even since 1983, this Court's certiorari jurisdiction is

limited in a manner that excludes most court-martial convictions from its reach. This Court has statutory certiorari jurisdiction over cases in which CAAF reviewed a death sentence, cases that one of the four Judge Advocates General certified to CAAF, cases in which CAAF granted the defendant's petition for review, and cases in which CAAF issued some form of extraordinary relief. 28 U.S.C. § 1259 (2006). If the Air Force Court were to deny Petitioner relief upon remand and CAAF were to then deny his petition for review, Petitioner would be precluded from seeking certiorari, leaving him without effective recourse to challenge CAAF's opinion below authorizing the reinstatement of his child pornography conviction. *See* Article 67a(a), UCMJ, 10 U.S.C. § 867a(a) (2006) ("The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.").

The danger that Petitioner might be precluded from seeking certiorari following a remand is heightened by a recent change in CAAF's practice. As CAAF noted earlier this year, before a recent change to its rules, its practice had been to grant the petition of a defendant seeking a second review after an initial remand to a Court of Criminal Appeals. *U.S. Court of Appeals for the Armed Forces Proposed Rules Changes*, 75 Fed. Reg. 8682, 8683 (proposed Feb. 19, 2010) (adopted May 5, 2010). As CAAF explained, the purpose of that policy was "to protect the right to seek certiorari review at the Supreme Court." *Id.* But CAAF recently amended its rules to "make it clear that there is no right to further review

[by CAAF] in all remanded cases." *Id.* Under CAAF's recently revised rule, when a defendant files a petition seeking CAAF's review of a case that it had previously remanded, the petition must specify "the issue or issues on which certiorari review would be sought, whether related to the remand or to the original decision by this Court." C.A.A.F. R. 21(b)(5)(G); *see Rules Changes*, 69 M.J. 159 (C.A.A.F. 2010). So if, upon remand, the Air Force Court affirms Petitioner's child pornography conviction, CAAF itself will decide whether to allow Petitioner to file another certiorari petition arguing that CAAF's original decision exceeded its statutory authority. Given the possibility that CAAF would deny review of Petitioner's case, thereby foreclosing another certiorari petition, it would be particularly appropriate for this Court to grant certiorari now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellant

v.

MICHAEL T. NERAD, Senior Airman,
U.S. Air Force, Appellee

No. 09-5006
Crim. App. No. 36994
69 M.J. 138

Argued December 8, 2009
Decided July 27, 2010

RYAN, J., delivered the opinion of the Court, in which EFFRON, C.J., and ERDMANN, J., joined. BAKER, J., filed a separate opinion concurring in the result. STUCKY, J., filed a separate dissenting opinion.

Counsel

For Appellant: *Lieutenant Colonel Jeremy S. Weber* (argued); *Colonel Douglas P. Cordova* and *Gerald R. Bruce* (on brief).

For Appellee: *Dwight H. Sullivan*, Esq. (argued); *Captain Jennifer J. Raab* and *Captain Tiffany M. Wagner* (on brief); *Major Shannon A. Bennett.*

Amicus Curiae for Appellant: *Colonel Norman F.J. Allen, Major Sara M. Root, Captain Sasha N. Rutizer,* and *Captain Sarah J. Rykowski* (on brief)—for the Army Appellate Government Division.

Amicus Curiae for Appellee: *Michelle M. Lindo McCluer, Jonathan E. Tracy, Eugene R. Fidell,* and *Stephen A. Saltzburg* (on brief)—for the National Institute of Military Justice.

Military Judge: Gary M. Jackson

Judge RYAN delivered the opinion of the Court.

In accordance with his pleas, a general court-martial, composed of a military judge sitting alone, found Appellee guilty of failure to obey a lawful order, wrongful disposition of military property, larceny, sodomy, possession of child pornography, and adultery, violations of Articles 92, 108, 121, 125, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 908, 921, 925, 934 (2006). The military judge sentenced Appellee to a dishonorable discharge, confinement for twelve months, forfeiture of all pay and allowances, a reprimand, and a reduction to the grade of E-1. The convening authority approved the findings and sentence.

The United States Air Force Court of Criminal Appeals (CCA) reviewed the case pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006). *United*

States v. Nerad, 67 M.J. 748, 749 (A.F. Ct. Crim. App. 2009). Despite concluding that there was no legal or factual error in the case, it nonetheless set aside and dismissed the finding of guilty to the child pornography offense based on the "unique circumstances" of the case. *Id.* at 752-53; *see infra* Part I. The court approved the remaining findings and approved the sentence as adjudged. 67 M.J. at 753.

The Judge Advocate General of the Air Force certified the case to this Court for review of the following issue:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN NULLIFYING APPELLEE'S FACTUALLY AND LEGALLY SUFFICIENT CONVICTION FOR POSSESSION OF CHILD PORNOGRAPHY.

We hold that while CCAs have broad authority under Article 66(c), UCMJ, to disapprove a finding, that authority is not unfettered. It must be exercised in the context of legal—not equitable—standards, subject to appellate review. *United States v. Quiroz,* 55 M.J. 334, 339 (C.A.A.F. 2001). Relatedly, while Article 66(c), UCMJ, affords a CCA broad powers, when faced with a constitutional statute a CCA "cannot, for example, override Congress' policy decision, articulated in a statute, as to what behavior should be prohibited." *United States v. Oakland Cannabis Buyers' Coop.,* 532 U.S. 483, 497 (2001).

Here, it is unclear from the CCA's opinion whether it exceeded its authority by disapproving a finding with reference to something other than a legal standard, potentially infringing on the sole prerogative of the convening authority under Article 60, UCMJ, 10 U.S.C. § 860 (2006), to disapprove a finding based on purely equitable grounds. It is also unclear from the CCA's opinion whether the CCA abused its discretion by refusing to affirm a finding because it thought it "unreasonable" to criminalize such conduct "under the circumstances," even though the circumstances fell squarely within the definition of child pornography crafted by Congress and referenced by the CCA. 18 U.S.C. § 2256(1) (2006) (defining "minor" as "any person under the age of eighteen years"), *cited in Nerad,* 67 M.J. at 751. Accordingly, the case is remanded for further proceedings before the lower court.

I.

A.

The facts relevant to the charge and specification dismissed by the CCA involve a consensual sexual relationship between Appellee, who was married, and GL, a seventeen-year-old female. They each took sexually explicit pictures of one another, including pictures in which they were engaged in sexual conduct with each other. Based on his possession of these sexually explicit pictures of GL, the Government charged Appellee with possession of child pornography in violation of Article 134, UCMJ.

Appellee not only did not contest the child pornography charge at trial, but prior to entering his pleas he signed a "Notification of Sex Offender Registration Requirement," which informed him that he might be required to register as a sex offender upon conviction of the charged offense.

In his clemency request to the convening authority, Appellee asked that the convening authority set aside the child pornography conviction. *See generally* Article 60(c)(1), UCMJ (providing that the convening authority may exercise "sole discretion" as a matter of "command prerogative" in deciding whether to set aside or modify the findings or sentence); Rule for Courts-Martial (R.C.M.) 1107(c) Discussion (noting that the convening authority may set aside a finding "for any reason or no reason"). While acknowledging that he had committed "a crime," that the circumstances did not provide "a defense," and that he was "in fact, guilty of this offense," Appellee requested that the convening authority take into account the particular circumstances of his relationship with GL and "determine [that] a federal conviction for this offense is not appropriate in my case." The convening authority declined to grant this clemency request.

B.

Appellee did not challenge his convictions in his submission of issues to the CCA under Article 66(c), UCMJ. Rather, he requested sentence relief through an Eighth Amendment challenge to the conditions of

his post-trial confinement, a request that the lower court rejected. *Nerad*, 67 M.J. at 749-50.

On an issue raised *sua sponte*, however, the CCA determined that it had the power to set aside the child pornography finding even though it could "find no legal error and the appellant never raised an issue at trial, pleading guilty to that offense." *Id.* at 751. As justification for this action the CCA noted that Appellee "was in the unique position of having a relationship with someone he could legally see naked and, but for his existing marriage, legally have sex with, but could not legally possess nude pictures ... that she took [of herself] and sent to him." *Id.* at 751. The CCA concluded that "possession of the photos under these circumstances is not the sort of conduct which warrants criminal prosecution for possessing child pornography and that this conviction unreasonably exaggerates the criminality of his conduct." *Id.* The CCA took particular note of the fact that a conviction for child pornography would require Appellee to register as a sex offender and endure "the significant consequences of such registration." *Id.* at 752. Based upon these considerations, the CCA dismissed the finding of guilty to the child pornography offense, affirmed the remaining findings, and approved the sentence as adjudged. *Id.* at 752-53.

II.

Article 66(c), UCMJ, states, in relevant part, that a CCA "may affirm only such findings of guilty, and the sentence or such part or amount of the

sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Broken into its constituent parts, this statutory language provides that a CCA may affirm only such findings and sentence that it: (1) finds correct in law; (2) finds correct in fact;[1] and (3) determines, on the basis of the entire record, should

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[1] The phrase "correct in law and fact," Article 66(c), UCMJ, is used throughout our cases as synonymous with legal and factual sufficiency. *See, e.g., United States v. Beatty,* 64 M.J. 456, 458 (C.A.A.F. 2007) (equating the two while discussing the extent of a CCA's power under Article 66(c), UCMJ, concluding that "[a] Court of Criminal Appeals may not affirm the findings and sentence of a court-martial unless it finds them to be both factually and legally sufficient. Article 66(c), UCMJ"); *see also United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000) ("The test for legal sufficiency requires courts to review the evidence in the light most favorable to the Government. If any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient.... The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of the accused's guilt beyond a reasonable doubt.") (citations and quotation marks omitted). The latter determination is unique to the military justice system, as it requires a CCA to review the record *de novo* and determine whether the accused is guilty beyond a reasonable doubt.

be approved. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).[2] At issue in this case is the scope and meaning of the "should be approved" language. The scope and meaning of Article 66(c), UCMJ, is a matter of statutory interpretation, a question of law reviewed *de novo*. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008).

The parties agree, consistent with our precedent, that a CCA may approve only that part of a sentence that it finds "should be approved."[3] FN3 *See, e.g.*,

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[2] "In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." Article 66(c), UCMJ.

[3] We note that *Jackson v. Taylor*, 353 U.S. 569 (1957), does not control the question now before us because the Supreme Court had no occasion to address the "should be approved" language of Article 66(c), UCMJ, in the context of a sentence that was correct in law and fact. *Jackson* itself involved a situation where the sentence imposed by the court-martial was no longer "correct," or even lawful, because the original sentence exceeded the maximum punishment permissible for the finding that remained. *Id.* at 570. In that context the Supreme Court affirmed the power of a board of review—the precursor to today's CCAs to modify a sentence "in the manner it finds appropriate." *Id.* at 579. *Jackson* did not, however, limit boards of review to acting in instances where a sentence was not "correct." Instead, it reiterated a broader

United States v. Christopher, 13 C.M.A. 231, 235-36, 32 C.M.R. 231, 235-36 (1962). In reviewing the exercise of this power, we ask if the CCA abused its discretion or acted inappropriately-i.e., arbitrarily, capriciously, or unreasonably-as a matter of law. *See, e.g., United States v. Jones*, 39 M.J. 315, 317 (C.M.A.1994) ("We will only disturb the [CCA's] reassessment [of a sentence] in order to prevent obvious miscarriages of justice or abuses of discretion.") (citations and quotation marks omitted); *Christopher*, 13 C.M.A. at 236, 32 C.M.R. at 236.

The parties disagree, however, on the scope of a CCA's power as to findings. Appellee argues that "should be approved" means that the CCA has unfettered discretion to disapprove, for any reason or no reason at all, a finding that is correct in law and fact and that the exercise of that discretion is not subject to appellate review. The Government takes the opposite position, arguing that if a finding is correct in law and fact the CCA must approve it.

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proposition, consistent with the plain meaning of the statute: CCAs have the power to affirm only so much of a sentence as they find "appropriate." *Id.* In any event, the dissent's interpretation of *Jackson*, *United States v. Nerad*, 69 M.J. at 151-52 (C.A.A.F. 2010) (Stucky, J., dissenting), is squarely at odds with this Court's interpretation. *See United States v. Sills*, 56 M.J. 239, 240 (C.A.A.F. 2002); *United States v. Miller*, 10 C.M.A. 296, 299, 27 C.M.R. 370, 373 (1959).

Consistent with our case law, we adopt neither position. *See Quiroz,* 55 M.J. at 338-39 (permitting the CCA to disapprove legally and factually sufficient findings but remanding to ensure the lower court applied a legal as opposed to an equitable standard); *Tardif,* 57 M.J. at 224 (recognizing that a CCA has discretion under Article 66(c), UCMJ, to fashion an appropriate remedy for excessive post-trial delay with respect to findings or sentences that are legally and factually correct).

A.

We begin from the settled premise that in exercising its statutory mandate a CCA has discretion to approve only a sentence, or such part of a sentence, that it "determines, on the basis of the entire record, should be approved," Article 66(c), UCMJ, even if the sentence is "correct." *See United States v. Atkins,* 8 C.M.A. 77, 79, 23 C.M.R. 301, 303 (1957) ("In short, the criterion for the exercise of the board of review's power over the sentence is not legality alone, but legality limited by appropriateness."). Even that broad discretion is not unfettered, however. *See United States v. Lacy,* 50 M.J. 286, 287-89 (C.A.A.F.1999) (reviewing a CCA's sentence appropriateness determination for abuse of discretion).

The Government argues that this has no bearing on the certified question because "should be approved" has meaning only with respect to a CCA's power to disapprove or modify a sentence. We disagree that "should be approved" has no meaning

with respect to a CCA's action on findings. "[F]indings" and "sentence" are grammatically coupled in Article 66(c), UCMJ, joined equally with "and determines ... should be approved." The phrase "should be approved" must have meaning with respect to findings as well as sentence and modify both. When a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents. *Bingham, Ltd. v. United States*, 724 F.2d 921, 925-26 n.3 (11th Cir. 1984); *see also, e.g., Elliot Coal Mining Co. v. Director, Office of Workers' Comp. Programs*, 17 F.3d 616, 630 (3d Cir. 1994) ("[U]se of a comma to set off a modifying phrase from other clauses indicates that the qualifying language is to be applied to all of the previous phrases and not merely the immediately preceding phrase."). Therefore, it is impossible—based on the statute—to acknowledge a CCA's power to modify or disapprove a "correct" sentence while disagreeing it has any such power with respect to a "correct" finding. Nor is such a view consistent with our limited precedent on this question. *See, e.g., Quiroz*, 55 M.J. at 338-39; *United States v. Drexler*, 9 C.M.A. 405, 408, 26 C.M.R. 185, 188 (1958).

B.

Despite the statutory text and our case law, the Government and dissent, *Nerad*, 69 M.J. at 153-54 (Stucky, J., dissenting), rely on language in *United States v. Waymire*, 9 C.M.A. 252, 26 C.M.R. 32 (1958), for the proposition that whatever the CCA's power with respect to sentence, the CCA has no

discretion when it comes to approving legally and factually sufficient findings. The *Waymire* Court did assert that:

> Unlike a convening authority, who may disapprove findings of guilt for any reason, or for no reason at all, a board of review may only disapprove such findings as it finds incorrect in law and fact. It was never intended that a board of review be given the power to disapprove findings in its "discretion."

Id. at 255, 26 C.M.R. at 35 (citation omitted). But in that case the board of review sidestepped the legal issues entirely, acting instead in a manner "not unlike an arbitration or mediation board designed to effect an adequate and satisfactory compromise between negotiating parties." *Id.* at 254, 26 C.M.R. at 34. On appeal, the Judge Advocate General of the Army asked this Court to consider "whether a board of review had the power to set aside findings of guilt without first deciding whether the court-martial had jurisdiction, or whether such findings were incorrect in law and fact." *Id.* at 253, 26 C.M.R. at 33. This Court held that the board did not have such a power, stating that "in setting aside the forgery conviction solely on the basis of 'substantial justice,' [the board of review] exceeded the scope of its authorized statutory functions." *Id.* at 255, 26 C.M.R. at 35. We did not present a holding on what the words "should be approved" entailed in the context of a board's action on legally and factually sufficient findings—nor could we, since the board had not even

attempted to undertake such sufficiency determinations. Our use of the phrase "substantial justice" served to reject the board's assumption that its function was to forge an equitable compromise between the parties. *Waymire* thus serves as precedent for the unremarkable proposition that CCAs may not disapprove findings on equitable grounds or disregard their statutory duty to determine legal and factual sufficiency.[4]

Further, the language the Government and the dissent draw from *Waymire* has not functioned in practice as precedent on the question whether the CCAs may disapprove findings that are correct in law and fact.[5] Indeed, one month after *Waymire*, this Court decided *Drexler* with language suggesting that intermediate courts had such a power:

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[4] This holding supports a conclusion we reach with respect to the certified question: a CCA may not disapprove a finding based solely on equitable grounds.

[5] It is instructive that in two of this Court's relatively recent cases addressing the valid scope of CCA action under Article 66(c), UCMJ—*Tardif*, 57 M.J. at 230 (Sullivan, S.J., dissenting), and *Quiroz*, 55 M.J. at 345 (Sullivan, J., dissenting)—*Waymire* was cited *in dissent* for the very proposition relied upon by the Government and the dissent in this case. *See Nerad*, 69 M.J. at 153-54 (Stucky, J., dissenting). Perhaps recognizing this, the Government did not even raise *Waymire* until its reply brief to this Court.

> Apart from the special rules of law applicable in this area, there is the general principle that an appellate tribunal can dismiss even a valid finding as part of its action in correcting errors at the trial and to insure justice to the accused. This general power is possessed by the boards of review.

9 C.M.A. at 408, 26 C.M.R. at 188 (citations omitted);[6] *see also Quiroz,* 55 M.J. at 338 (noting that we have described Congress's grant of authority to the CCAs under Article 66(c), UCMJ, as an "'awesome, plenary, *de novo* power,'" but denying that this power is equitable in nature (quoting *United States v. Cole,* 31 M.J. 270, 272 (C.M.A. 1990))); *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991) (holding that a CCA may disregard doctrines like waiver "in the interest of justice" to reach legal errors that would otherwise be uncognizable).

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[6] *Drexler* involved the disapproval of charges that were multiplicious. *Id.* at 407, 26 C.M.R. at 187. Multiplicious charges may be correct in law and fact (under the applicable standards of review for legal and factual sufficiency) but may nonetheless be disapproved by the CCA (using a legal standard). *See Quiroz,* 55 M.J. at 338-39. *Drexler* is thus consistent with our view that a CCA may only set aside a legally and factually sufficient finding on the basis of a legal—as opposed to equitable—ground.

Today's decision does not overrule *Waymire*. *Waymire*'s holding on the certified issue in that case—that a CCA may not decide a case on equitable grounds and avoid its duty to determine whether a finding is correct in law and fact, 9 C.M.A. at 254-55, 26 C.M.R. at 34-35—remains undisturbed. *Waymire* does not answer the certified issue in this case. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend...."). And dictum otherwise contained in the case is both contrary to the statutory text and has been eroded by subsequent decisions.

C.

While we acknowledge that a CCA's power is not as narrow as the Government suggests, nor as broad as Appellee desires, this does not answer the separate question of its scope with respect to a finding that is correct in law and fact.

At first glance, the language "it finds ... should be approved" in Article 66(c), UCMJ, might appear to empower a CCA to modify both findings and sentence for any reason or no reason at all, which is Appellee's position. Admittedly, this Court has used broad language with respect to the CCAs' discretion that could be read to support this interpretation. *See, e.g., Tardif*, 57 M.J. at 223 (recognizing the broad power of the Courts of Criminal Appeals to protect an accused); *Claxton*, 32 M.J. at 162 (indicating that Article 66(c), UCMJ, confers to CCAs "*carte blanche* to do justice"); *see also United*

States v. Lanford, 6 C.M.A. 371, 379, 20 C.M.R. 87, 95 (1955) (stating that the distinction in labeling CCA action as clemency rather than judicial action "matters little, so long as it is clearly understood ... [that the Boards of Review maintain] the power to treat an accused with less rigor than their authority permits") (citation and quotation marks omitted). For "[i]n enacting the UCMJ in 1950, Congress saw fit to give the Boards of Review ... very broad powers with respect to the approved findings and sentences of courts-martial." *Beatty,* 64 M.J. at 458. We have repeatedly—"[i]n words that have often been cited"—characterized a CCA's Article 66(c), UCMJ, authority as an "awesome, plenary *de novo* power of review [that] grants unto the Court ... authority to, indeed, 'substitute its judgment' for that of the military judge .... [and] for that of the court members."[7] *Beatty,* 64 M.J. at 458 (quoting *Cole,* 31 M.J. at 272) (alterations in original).

But the language in these cases does not exist in a vacuum. Notably, Congress used different language in granting review authority to a convening authority under Article 60, UCMJ, and CCAs under Article 66, UCMJ. This different

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[7] And, of course, the requirement that the CCA review the record to ensure that the findings are factually sufficient, that it is convinced beyond a reasonable doubt that the facts support a finding of guilt, permits it to do just that. *See United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002).

language—along with the factual settings of cases acknowledging a CCA's discretion to modify a sentence or finding under Article 66(c), UCMJ, and well-established boundaries on a court's discretion related to constitutional statutes—compels the conclusion that there are some limitations on a CCA's power to disapprove a "correct" finding.

The cases interpreting Article 66(c), UCMJ, have reflected this Court's attention to the specialized nature of the military justice system, particularly with respect to the unique functions and responsibilities of convening authorities and CCAs. Congress's statutory grant of authority to the CCAs with respect to findings and sentence is more limited than the authority granted a convening authority. Congress provided the convening authority with clear unfettered discretion—as "a matter of command prerogative"—to modify findings and sentence under Article 60(c), UCMJ:

> (1) The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority....
>
> (2) ... The convening authority ... in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.
>
> (3) Action on the findings of a court-martial by the convening authority ... is not required.

> However, such person, in his sole discretion, may—
>
> (A) dismiss any charge or specification by setting aside a finding of guilty thereto; or
>
> (B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

Accord United States v. Finster, 51 M.J. 185, 186 (C.A.A.F. 1999) (noting that convening authorities enjoy "unfettered discretion to modify the findings and sentence for any reason—without having to state a reason—so long as there is no increase in severity"); R.C.M. 1107(c) Discussion (noting a convening authority may set aside a finding "for any reason or no reason").

While the CCA clearly has the authority to disapprove part or all of the sentence and findings, nothing suggests that Congress intended to provide the CCAs with unfettered discretion to do so for any reason, for no reason, or on equitable grounds, which is a function of command prerogative. *See United States v. Prince*, 16 C.M.A. 314, 315-16, 36 C.M.R. 470, 471-72 (1966) (citing legislative history distinguishing the convening authority's power of unfettered discretion over sentences from the more limited power of review of both intermediate appellate courts and this Court). The language of Article 60(c), UCMJ, gives a convening authority unfettered discretion; the language of Article 66(c),

UCMJ, is not as bold. We assume Congress used different language for a reason. *E.g.,* 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 46:6, at 252 (7th ed.2007). The CCAs' power, therefore, must be more limited.

Nonetheless, the words "should be approved" do have some meaning, and we reject the proposition that the "should be approved" clause of Article 66(c), UCMJ, means *only* that the lower court can adjust findings and sentences that are incorrect in law or fact, at least as the standards for legal and factual sufficiency are ordinarily understood, *see supra* note 1. *But see Nerad,* 69 M.J. at 150-51 (Stucky, J., dissenting). That approach both fails to afford independent meaning to "should be approved" and renders it surplusage, as a CCA clearly may not approve a legally or factually insufficient finding or an illegal sentence.[8] *See New Process Steel, L.P. v.*

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[8] Moreover, if "should be approved" modifies both findings and sentences, that approach cannot easily be reconciled with precedent acknowledging that a CCA may disapprove "correct" findings and sentences because they are nonetheless "inappropriate," or "unreasonable" as a matter of law. *See, e.g., Quiroz,* 55 M.J. at 339; *Drexler,* 9 C.M.A. at 408, 26 C.M.R. at 188. *Jackson* itself noted that Congress contemplated CCAs having the power to "'set aside, on the basis of the record, any part of a sentence, either because it is illegal *or* because it is inappropriate.'" 353 U.S. at 577 n. 8

NLRB, No. 08-1457, 2010 U.S. LEXIS 4973, at *11, 2010 WL 2400089, at *4 (U.S. June 17, 2010) (citing *Duncan v. Walker,* 533 U.S. 167, 174 (2001) (declining to adopt a "construction of the statute, [that] would render [a term] insignificant")).[9]

Our sentencing decisions on this point underscore that the statutory phrase "should be approved" does not involve a grant of unfettered discretion but instead sets forth a legal standard subject to appellate review. *See, e.g., United States v. Hutchison,* 57 M.J. 231, 234 (C.A.A.F. 2002) (remanding a lower court decision for *de novo* review in view of the possibility that the lower court, in holding a sentence to be inappropriate, exceeded its powers); *see also Lacy,* 50 M.J. at 288 (holding Article 66(c), UCMJ, bars the lower courts acting on issues of sentence appropriateness from committing "obvious miscarriages of justice or abuses of discretion" and referencing factors that a CCA might

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(quoting S. Rep. No. 81-486, at 28 (1949), *reprinted in* 1950 U.S.C.C.A.N. 2222, 2254) (emphasis added).

[9] Contrary to the dissent's assertion that our interpretation of Article 66(c), UCMJ, "discover[s] a hitherto unknown power," *Nerad,* 69 M.J. at 149 (Stucky, J., dissenting), the present opinion reflects the established analysis of the statute offered by the Court in our prior decisions. *See supra* 141-43; *Tardif,* 57 M.J. at 224; *Quiroz,* 55 M.J. at 338; *United States v. Wheelus,* 49 M.J. 283, 288 (C.A.A.F. 1998); *Claxton,* 32 M.J. at 162.

look to in determining whether sentence reassessment was warranted); *Christopher,* 13 C.M.A. at 236, 32 C.M.R. at 236 (noting Article 66(c), UCMJ, does not authorize the lower courts, while reviewing a sentence, to take an action that is "arbitrary, capricious"). Article 66(c), UCMJ, empowers the CCAs to "do justice," with reference to some legal standard, but does not grant the CCAs the ability to "grant mercy." *United States v. Boone,* 49 M.J. 187, 192 (C.A.A.F. 1998) (citation and quotation marks omitted). Granting mercy for any reason or no reason is within the purview of the convening authority. *Id. Contra Lanford,* 6 C.M.A. at 378-79, 20 C.M.R. at 94-95 (suggesting that intermediate appellate courts may grant clemency).

Moreover, although we have held that Article 66(c), UCMJ, permits a CCA to examine the record in a particular case and dismiss a finding because an accused's criminality was unreasonably exaggerated by the same acts beings charged multiple ways, *Quiroz,* 55 M.J. at 338-39, we have never suggested that Article 66(c), UCMJ, permits a CCA to disapprove a legally and factually sufficient finding because it believes that the conduct—while falling squarely within the ambit of behavior prohibited by a constitutional criminal statute—should not be criminalized.[10] Nor could we. *Oakland Cannabis*

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[10] This is distinguished, of course, from the well-established authority of the President within the military justice system to clarify or give meaning to the UCMJ through promulgation of the Discussion and Analysis sections of the *Manual for Courts-*

Buyers' Coop., 532 U.S. at 490-91, 498-99 (rejecting the suggestion that even a court acting in equity could effectively decriminalize actions clearly barred under the Controlled Substances Act by crafting a medical-necessity exception to the Act's prohibitions against marijuana).

D.

As demonstrated above, the broad language with which we have described the CCAs' powers has been cabined in practice. While we have held that the CCAs can assess the record and determine whether the findings and sentence "should be approved" in the event of error even if the error did not rise to the level of requiring disapproval of the finding or sentence as a matter of law, those decisions arose in the context of trial and post-trial errors in which

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Martial, United States. *See United States v. Contreras*, 69 M.J. 120, 121 n.2 (C.A.A.F. 2010) ("The President's analysis of the punitive articles is persuasive, but not binding, authority.... Moreover, where the President's narrowing construction is favorable to an accused and is not inconsistent with the language of a statute, we will not disturb the President's narrowing construction, which is an appropriate Executive branch limitation on the conduct subject to prosecution." (citing *United States v. Miller*, 67 M.J. 87, 89 (C.A.A.F. 2008); *United States v. Guess*, 48 M.J. 69, 71 (C.A.A.F. 1998))) (alterations and quotation marks omitted); *see also United States v. Jones*, 68 M.J. 465, 471-72 (C.A.A.F. 2010).

doctrines applicable to issues of law—such as waiver—would have precluded CCA action in the absence of the "should be approved" language of Article 66(c), UCMJ.[11] *See Quiroz*, 55 M.J. at 338 (stating that the lower court, having identified an unreasonable multiplication of charges—an abuse of prosecutorial discretion—possessed the authority under Article 66(c), UCMJ, "to determine the circumstances, if any, under which it would apply waiver or forfeiture"); *Wheelus*, 49 M.J. at 288 (recognizing that, while clemency is the province of the convening authority, the intermediate courts have "broad power to moot claims of prejudice" under Article 66(c), UCMJ, related to error in the post-trial process); *Claxton*, 32 M.J. at 164 (approving a decision by the intermediate court to order a sentence rehearing in light of an evidentiary error during sentencing under circumstances in which waiver would have ordinarily precluded

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[11] It is not accurate to equate—as the dissent implicitly does, *Nerad*, 69 M.J. at 150-51, 154 (Stucky, J., dissenting)—any and all error in the proceedings with the separate and distinct tests for whether the *finding* and *sentence* are "correct in law and fact." Article 66(c), UCMJ; *see supra* note 1. A disparate sentence or a multiplicious finding can be correct in law and fact but nonetheless "inappropriate" or "unreasonable." *See, e.g., Quiroz*, 55 M.J. at 339; *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982); *Drexler*, 9 C.M.A. at 408-09, 26 C.M.R. at 188-89.

relief). We have expressly declined to agree that a CCA may disapprove a finding based on pure equity. *Quiroz*, 55 M.J. at 339.

To be clear, when a CCA acts to disapprove findings that are correct in law and fact, we accept the CCA's action unless in disapproving the findings the CCA clearly acted without regard to a legal standard or otherwise abused its discretion. A CCA abuses its discretion when it disapproves a finding based on purely equitable factors or because it simply disagrees that certain conduct—clearly proscribed by an unambiguous statute—should be criminal. Even though a CCA is not required to identify the basis for its action, failure to do so makes it difficult to determine whether a CCA's exercise of its Article 66(c), UCMJ, power was made based on a correct view of the law. The better practice, if a CCA sets aside a finding or sentence that is correct in law and fact, is for it to explain why the finding is unreasonable, based on a legal standard.

III.

Although this Court is required by statute to review the present appeal under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2006) (review of cases certified by the Judge Advocate General), Appellee argues that even if we identify an erroneous application of the law by the lower court, no remedial action—such as a remand to apply the correct principles of law—can be ordered.

Our precedent is to the contrary. In *United States v. Leak*, 61 M.J. 234 (C.A.A.F. 2005), we observed that this Court, since the early days of the UCMJ, has reviewed lower court decisions under Article 67(a)(2), UCMJ, for compliance with the law, and we have not confined corrective action to those cases found by the lower court to be "incorrect in law." *See id.* at 239-42; *see also Quiroz*, 55 M.J. at 338-39 (rejecting a factor the CCA used in conducting the unreasonable multiplication of charges analysis and remanding for the CCA to apply the correct factor); *United States v. Thompson*, 2 C.M.A. 460, 464, 9 C.M.R. 90, 94 (1953) (reversing a CCA's factual sufficiency determination because it misapprehended the legal elements of the offense, and remanding for the CCA to conduct a new factual sufficiency review using the appropriate elements). Rather, the power to review a case under Article 67(a)(2), UCMJ, includes the power to order remedial proceedings, such as a remand, to ensure that the lower court reviews the findings and sentence approved by the convening authority in a manner consistent with a "correct view of the law." *See Leak*, 61 M.J. at 242 (citation and quotation marks omitted).

Whether the CCA's review in this case was consistent with a "correct view of the law" is an open question. The CCA appeared to believe it had unfettered discretion to disapprove a finding. The court identified no error—even error that would not preclude a determination that the finding was correct in law and fact—or other legal rationale with respect to the charge, the specification, the finding,

the trial, or the post-trial process that warranted exercise of its unique power under Article 66(c), UCMJ.[12] Nor did the CCA identify tangible factors, either by reference to other charges in the case or by reference to other cases, that led it to conclude that the finding "unreasonably exaggerate[d] the criminality of" the conduct, *Nerad*, 67 M.J. at 751-52, or any factor that caused the charge, albeit lawful, to constitute an abuse of prosecutorial discretion. *Cf. United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M. Ct. Crim. App. 2002) (finding an unreasonable multiplication of charges based on clearly explained factors).

While none of these factors are either required or dispositive, the CCA's comment that it disapproved the finding because it was "not the sort of conduct which warrants criminal prosecution," *Nerad*, 67 M.J. at 751, gives us pause, particularly in light of its failure to discuss any of the non-exclusive bases that may have made its action appropriate.

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[12] Under the present circumstances, where the CCA did not purport to disapprove the finding on the basis of a legal error, this case simply does not implicate or address Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2006) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."). *Contra Nerad*, 69 M.J. at 149, 154-55 (Stucky, J., dissenting).

It is possible that the CCA believed it could set aside a finding in a guilty plea case where the accused was fully apprised of the collateral consequences of his conviction on the ground that it believed that: (a) Appellee should not have been prosecuted; or (b) the convening authority should have granted the clemency Appellee requested. But both of those decisions are matters of command prerogative and, as such, are for the convening authority, not the CCA. Article 60(c), UCMJ; *United States v. Travis*, 66 M.J. 301, 303 (C.A.A.F. 2008) ("Clemency is a highly discretionary command function of a convening authority.") (citation and quotation marks omitted). Moreover, given the reasoning underlying the CCA's decision here, the CCA may have disapproved the finding of guilty to the child pornography offense (which criminalizes the relevant conduct with persons under the age of eighteen without exception, *see* 18 U.S.C. § 2256(1)) based on its own judgment regarding the wisdom of applying the statute to cases where "the appellant was in the unique position of having a relationship with someone he could legally see naked and, but for his existing marriage, legally have sex with, but could not legally possess nude pictures of her that she took and sent to him." *Nerad*, 67 M.J. at 751. This it may not do. *See Badaracco v. Comm'r*, 464 U.S. 386, 397-98 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.").

If the CCA in fact based its decision on the above rationale, labeling the finding "unreasonable" does not transform a quintessentially equitable

determination into a legal one. In light of the foregoing, the case is remanded for a new Article 66(c), UCMJ, review consistent with this decision.

IV.

The decision of the United States Air Force Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for remand to the United States Air Force Court of Criminal Appeals for a new review under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006).

BAKER, Judge (concurring in the result):

In my view, the majority seeks to decide too much and rebut too much at this stage in the proceedings. As a result, I write separately to concur in the result.

Courts of Criminal Appeals (CCAs) are courts of law. They can decide cases based on principles of law or issues of fact. Viewing the words of Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006), in the context of the UCMJ as a whole, and the role of CCAs within that UCMJ, it is clear that CCAs are not equitable courts, and they are not policy-making bodies. They are empowered to decide cases based on principles of law applied in the context of Article 66, UCMJ.

The problem here is that we do not know on what legal basis, if any, the lower court dismissed the charge in this case; the lower court's opinion does not elaborate. It appears that the lower court has acted with de facto clemency; however, having decided to make Appellant's appeal a test case, the CCA should have an opportunity to explain its reasoning. Therefore, I agree with the remand. With the benefit of additional input from the lower court regarding what legal principles it applied, if any, in reaching its conclusions, we will better understand where the case-specific and statutory fault lines lie between the various opinions. At that point, this Court will be able to more squarely address the Article 66, UCMJ, issues at hand.

STUCKY, Judge (dissenting):

> Equity is a Roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they

> should make the Standard for the measure we call a Foot, a Chancellor's Foot; what an uncertain Measure would be this. One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot: 'Tis the same thing in the Chancellor's Conscience.

John Selden, *Table-Talk: Being the Discourses of John Selden, Esq.* 43-44 (Israel Gollancz ed., The Temple Classics, 3d ed.1906) (1689).

Sixty years after the enactment of the Uniform Code of Military Justice (UCMJ), the United States Air Force Court of Criminal Appeals and the majority discover a hitherto unknown power of the Courts of Criminal Appeals (CCAs) to disapprove findings that are correct in law and fact under the "should be approved" clause of Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006). To infuse the "should be approved" clause with this desired meaning, the majority embarks on a quixotic quest. It reaches its destination by misreading Article 66(c), concocting a novel understanding of the term "correct in law," and despite protestations to the contrary, creating a standard so vague that it amounts to no standard at all, simply equity—the measure of the Chancellor's foot. Ultimately, the majority's approach eviscerates the requirement that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2006).

While I agree with the majority that we have jurisdiction over this case, I continue to believe that a CCA is not authorized to disapprove a finding or sentence that is correct in law and fact. The majority's reading of Article 66 is inconsistent with the language of the statute taken as a whole, the Supreme Court's opinion in *Jackson v. Taylor*, 353 U.S. 569 (1957), interpreting the statute, and this Court's precedents of more than fifty years.

The CCA's action in setting aside Appellee's conviction for possession of child pornography is beyond its statutory authority and therefore without effect. As the CCA found the conviction correct in law and fact, this Court should order the conviction reinstated.

I.

In exchange for the convening authority's agreement to withdraw two specifications and cap the period of confinement that could be approved, Appellee pled guilty to a number of offenses, including possession of child pornography under clauses 1 and 2 of Article 134, UCMJ, 10 U.S.C. § 934 (2006). The CCA pointed out that the charges grew out of a love affair that Appellee was having with a seventeen-year-old girl, who sent him nude photos and a video of herself over the Internet. *United States v. Nerad*, 67 M.J. 748, 751 (A.F. Ct. Crim. App. 2009). Although not raised by Appellee, the CCA asked whether it had authority to set aside a conviction that was correct in law and fact "in the interest of justice." *Id.* at 749. As Appellee could

lawfully see his paramour naked and, but for his existing marriage, have sex with her, the CCA concluded that:

> the [appellee's] possession of the photos under these circumstances is not the sort of conduct which warrants criminal prosecution ... and that this conviction unreasonably exaggerates the criminality of his conduct. *The question is whether we can set aside the conviction on that basis alone, even though we find no legal error and the appellant never raised an issue at trial, pleading guilty to that offense.* The government ... unconvincingly argues that neither the plain language of the statute, its legislative history, nor case precedent indicates the Court can set aside a finding of guilty that is found correct in law and fact. We disagree on all points.

Id. (emphasis added).[1]

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[1] Appellee could have challenged the specification at trial and asserted that, under the circumstances, he was not guilty. Instead, he chose to plead guilty. In that situation, the appropriate inquiry for the CCA would have been whether there was a substantial basis in law or fact for rejecting the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). Apparently there was none. Instead of affirming, however, the CCA chose to set sail on these uncharted waters. To permit an accused to

II.

This Court holds that the CCAs have broad authority to disapprove a finding that is correct in law and fact but that authority is not unfettered. *United States v. Nerad*, 69 M.J. 138, 140 (C.A.A.F. 2010). This Court will "accept the CCA's action unless in disapproving the findings the CCA clearly acted without regard to a legal standard or otherwise abused its discretion." *Id.* at 147. It remands to the court below apparently to identify an

> error—even error that would not preclude a determination that the finding was correct in law and fact—or other legal rationale with respect to the charge, the specification, the finding, the trial, or the post-trial process that warranted exercise of its unique power under Article 66(c), UCMJ. Nor did the CCA identify tangible factors, either by reference to other charges in the case or by reference to other cases, that led it to conclude that the finding "unreasonably exaggerate[d] the criminality of" the conduct, *Nerad*, 67 M.J. at 751-52, or any factor that caused the charge, albeit lawful, to constitute an abuse of prosecutorial discretion.

Id. at 147-48 (brackets in original) (footnote omitted).

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receive the benefit of a pretrial agreement and yet prevail on appeal when the conviction is correct in law and fact is astonishing.

III.

Although it is unclear to what extent it affects the ultimate decision in this case, the majority redefines the term correct in law to mean legally sufficient. *Nerad*, 69 M.J. at 141 n. 1 (citing *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)). This is a novel theory for which there is no support, even in the cases the majority cites.

Legal sufficiency concerns the state of the evidence against the accused—whether it is sufficient to justify the determination of the trier of fact that the accused is guilty beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Reed*, 54 M.J. at 41. The term "correct in law" is broader in scope and "pertains to errors of law." *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Legal insufficiency is an error of law and is thus subsumed in the term "correct in law." In *Beatty* and *Reed*, this Court was dealing with the specific question of whether the evidence was legally sufficient, not the broader question of whether the conviction was correct in law. *Beatty*, 64 M.J. at 457; *Reed*, 54 M.J. at 38.

IV.

The CCA's action, and the certified issue, require us to interpret Article 66, UCMJ. Questions of statutory construction are questions of law that we review de novo. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F.2008).

Our duty in interpreting a statute is to implement the will of Congress, "so far as the meaning of the words fairly permitl]." *Sec. & Exch. Comm'n v. Joiner,* 320 U.S. 344, 351 (1943). In doing so, where possible, we should "avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 112 (1991).

> As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (quotation marks and citations omitted). Whether the statutory language is ambiguous is determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997).

V.

The scope of the CCAs' authority is contained in Article 66(c), UCMJ, which provides that:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the

> findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

To analyze the statute, the majority breaks it down into its constituent parts: The CCA may affirm only such findings and sentence as it (1) finds correct in law; (2) finds correct in fact; and (3) "determines, on the basis of the entire record, should be approved." *Nerad*, 69 M.J. at 141. As the majority notes, the three constituent parts of Article 66(c) "are grammatically coupled" such that the "should be approved" language must apply to both findings and sentence. *Id.* at 142. The question, therefore, is what does "should be approved" mean and how should it apply within the context of the whole statute?

The majority examines what it believes to be the correct application of Article 66(c)'s third constituent part to sentencing and applies the same logic to findings. It contends that the phrase "determines ... should be approved" gives the CCAs discretion to alter a sentence that is correct in law and fact. *Id.* at 142, 145-46. By applying the same logic to findings, the majority determines that the CCAs also have

discretion to disapprove a finding that is correct in law and fact. *See id.* at 142-44.

Just as I disagree with the majority's analysis of the CCAs' powers to reduce sentences, I oppose its conclusions as to the CCAs' powers to disapprove findings. I conclude that the "should be approved" language is not an independent grant of power, but merely a mechanism by which Congress granted authority to the CCAs to correct errors of fact or law, based on the entire record, without having to remand for a rehearing.

VI.

The CCA's power to review a sentence for appropriateness is a function of its duty under Article 66(c) to affirm only so much of the sentence as it finds correct in fact. *See Jackson v. Taylor*, 353 U.S. 569, 576-77 (1957). It does not derive from the "should be approved" language of the statute. *But see United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F.1999).

A

In *Jackson*, the Army Board of Review set aside the petitioner's conviction for murder, affirmed his conviction for attempted rape, and reduced the sentence from mandatory confinement for life to the maximum for attempted rape—confinement for twenty years. 353 U.S. at 570. In a habeas petition, *id.* at 572, Jackson asserted that Article 66(c) was ambiguous and that he should have received the

benefit of that ambiguity: The Board of Review should have ordered a sentence rehearing rather than merely reassessing the sentence. *Id.* at 576. The Supreme Court found "no authority in the Uniform Code for such a procedure."[2] *Id.* at 579, 77 S.Ct. 1027. It concluded that

> the words [of the statute] are clear. *The board may "affirm ... such part or amount of the sentence, as it finds correct...."* That is precisely what the review board did here. *It affirmed such part,* 20 years, of the sentence, life imprisonment, *as it found correct in fact and law for the offense of attempted rape.* Were the words themselves unclear, the teachings from the legislative history of the section would compel the same result.

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[2] As the Supreme Court noted in *Jackson*, Congress never intended a case to be remanded back to a court-martial for a sentence rehearing. *See* Article 66(d), UCMJ (permitting remand when the CCA "sets aside the findings *and* sentence") (emphasis added); *but see United States v. Miller*, 10 C.M.A. 296, 299, 27 C.M.R. 370, 373 (1959) (concluding that it is "entirely unreasonable" to construe the statutory language in Article 66(d) as authorizing a rehearing only if the findings and sentence were set aside; that it would read the term "and" to mean "or"; and that *Jackson* did not intend to limit the power of the appellate courts to order rehearing on sentence alone); *accord United States v. Sills*, 56 M.J. 239, 240 (C.A.A.F. 2002).

Id. at 576 (emphases added).

B.

Because the Supreme Court found the language of Article 66(c) to be clear, there was and is no need to resort to the legislative history to interpret the statute. Nevertheless, while the Supreme Court decided *Jackson* based on the statute's clear language, it did not shun the legislative history but rather embraced it. It determined that the clear language of the statute was consistent with the legislative history. *Id.* at 576. It quoted the following portion of the legislative history as "augment[ing]" its conclusions:

> "The Board of Review shall affirm a finding of guilty of an offense or a lesser included offense ... if it determines that the finding conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused.... The Board may set aside, on the basis of the record, any part of a sentence, either because it is *illegal* or because it is *inappropriate*. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces."

Id. at 577 n.8 (emphases added) (quoting S. Rep. No. 81-486, at 28 (1949)); *see also* H.R. Rep. No. 81-491, at 31-32 (1949) (containing same language). Thus,

Jackson and the legislative history are congruent: A sentence that is illegal is incorrect in law and one that is inappropriate is incorrect in fact. If the sentence is illegal or inappropriate, the CCA should instead affirm the sentence that should be approved—a sentence that is correct in law and fact.

After the Board of Review set aside Jackson's murder conviction, his life sentence was incorrect in law—it exceeded the maximum punishment permitted for attempted rape, which was twenty years. After considering the entire record, the Board of Review determined, as a matter of fact, that confinement for twenty years was the legal and appropriate sentence. To read Article 66(c) in the manner the majority does—that the CCA's authority to determine sentence appropriateness stems from its duty to affirm only that part of the sentence that should be approved—renders superfluous the requirement to find the sentence correct in fact, something we are discouraged from doing. *See Solimino*, 501 U.S. at 112.

VII.

Contrary to the position taken by the Government, I agree with the majority's grammatical assessment of Article 66(c): The words "should be approved" apply to a CCA's review of both findings and sentence. *Nerad*, 69 M.J. at 142. But I understand the words to apply in a different manner, one that is consistent with the rest of the statute, including Article 66(d), UCMJ.

Article 66(d) provides that the CCA may order a rehearing if it sets aside both the findings *and* sentence. The "should be approved" language in Article 66(c) ties the power of the CCA to determine whether the findings and sentence are correct in law and fact with Article 66(d)'s limitations on ordering a rehearing. If only the sentence is incorrect in law or fact, the CCA may not order a rehearing. *See Jackson*, 353 U.S. at 579; Article 66(d), UCMJ. The CCA itself must determine what sentence "should be approved"—one that is correct in law and fact. If the CCA sets aside a finding *and* sentence it *may* order a rehearing. Article 66(d), UCMJ. The CCA does not order a rehearing if it sets aside a finding of guilty but the evidence nevertheless established the accused's guilt of a lesser included offense. Instead, it affirms the finding and sentence that "should be approved"—one that is correct in law and fact.

In the case now before us, the CCA held that, pursuant to its authority under Article 66(c) to affirm only those findings that should be approved, it had authority to overturn Appellee's guilty plea to the possession of child pornography "even in the absence of legal or factual error." *Nerad*, 67 M.J. at 751 (citing *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002)). As the findings were concededly correct in law and fact, and there appears to be no basis in law or fact for setting aside his guilty plea (indeed, that issue was not even raised), the CCA was without authority to determine that the conviction for possession of child pornography should not be affirmed. This conclusion is consistent with *Jackson* and our longstanding precedent, *United*

States v. Waymire, 9 C.M.A. 252, 26 C.M.R. 32 (1958).

VIII.

In *Waymire*, the Board of Review could not decide whether a court-martial had jurisdiction over the accused for one of his offenses. *Id.* at 254, 26 C.M.R. at 34. In lieu of reaching a decision on the jurisdiction question and without deciding whether the conviction was incorrect in law or fact, the Board of Review dismissed the offense in an act this Court characterized as akin to a compromise or arbitration. *Id.* at 253-54, 26 C.M.R. at 33-34. We held that the Board had exceeded the scope of its statutory authority and reversed. *Id.* at 255, 26 C.M.R. at 35.

The majority asserts that, in *Waymire*, we did not purport to interpret "what the words 'should be approved' entailed in the context of a board's action on legally and factually sufficient findings," and that "*Waymire* thus serves as precedent for the unremarkable proposition that CCAs may not disapprove findings on equitable grounds or disregard their statutory duty to determine legal and factual sufficiency." *Nerad*, 69 M.J. at 143. I disagree.

In *Waymire*, we *did* interpret the meaning and scope of the authority of the Boards of Review under Article 66(c):

> The extent of a board of review's powers over findings have frequently been the

subject of review by this Court. In *United States v. Fleming*, 3 C.M.A. 461, 13 C.M.R. 17, we said that a board of review "is under a duty to affirm so much of the findings of guilty as is not affected by error committed at the trial." Unlike a convening authority, who may disapprove findings of guilt for any reason, or for no reason at all, a board of review may only disapprove such findings as it finds incorrect in law and fact. *United States v. Massey*, 5 C.M.A. 514, 18 C.M.R. 138. It was never intended that a board of review be given the power to disapprove findings in its "discretion." *Cf.* Article 64, of the Uniform Code, *supra*, 10 U.S.C. § 864. *Not only does Article 66, supra, require that a board affirm findings of guilt which it determines to be correct in law and fact, but also that such determination be made "on the basis of the entire record."* In *United States v. Whitman*, 3 C.M.A. 179, 11 C.M.R. 179, we said that it was error for a board of review to rely upon matter lying outside the record of trial in setting aside an otherwise valid conviction. It was held in that case that such action went well beyond the statutory limits established by the Code. *Cf. United States v. Burns*, 2 C.M.A. 400, 9 C.M.R. 30. In the instant case, there is no question but that the board of review, in setting aside the forgery conviction solely on the basis of "substantial justice," exceeded the scope of its authorized statutory

> functions. *United States v. Gordon*, 2 C.M.A. 632, 10 C.M.R. 130.

9 C.M.A. at 255, 26 C.M.R. at 35 (emphasis added).

This Court did not just opine that the CCAs may only disapprove findings by reference to legal standards. *Nerad,* 69 M.J. at 143. It provided the standard: The CCA *must* affirm the conviction unless prejudicial error was committed at trial. *Waymire,* 9 C.M.A. at 255, 26 C.M.R. at 35; *see also Jackson,* 353 U.S. at 577 n.8.

The majority further attempts to trivialize *Waymire* by asserting that one month after deciding that case we suggested that the CCAs had the power to disapprove a finding that is correct in law and fact. *Nerad,* 69 M.J. at 143-44 (citing *United States v. Drexler,* 9 C.M.A. 405, 408, 26 C.M.R. 185, 188 (1958)). But that is not what *Drexler* says or means. As the majority quotes, "'an appellate tribunal can dismiss even a valid finding *as part of its action in correcting errors at the trial.*'" *Id.* at 143 (quoting *Drexler,* 9 C.M.A. at 408, 26 C.M.R. at 188) (emphasis added). Although Drexler's convictions were valid, in the sense that each was factually and legally sufficient on its own, the Board of Review did find an error of law—one of the charges was multiplicious with another. *Drexler,* 9 C.M.A. at 407, 26 C.M.R. at 187. Although at the time, reconsideration of the sentence was thought to "'cure any error resulting from any possible multiplication,'" we determined that dismissing the duplicating charge was within the sound discretion

of the Board of Review. *Id.* at 408, 26 C.M.R. at 188 (quoting *United States v. McCormick,* 3 C.M.A. 361, 363, 12 C.M.R. 117, 119 (1953)). Rather than contradict *Waymire* as the majority contends, *Drexler* actually supports it. The Board of Review in *Drexler* corrected an error of law; it did not act as a matter of discretion.

Nor is *Waymire* a mere sport, a unique holding unbuttressed by other authority. In fact, there was substantial authority prior to *Waymire* for the same view of the power of the Boards of Review. *See United States v. Fleming,* 3 C.M.A. 461, 465, 13 C.M.R. 17, 21 (1953) (positive duty of Board of Review to affirm findings not affected by error at trial); *United States v. Whitman,* 3 C.M.A. 179, 180, 11 C.M.R. 179, 180 (1953) (Board of Review exceeds Article 66 power when it set aside findings because it would "create an injustice" in light of convening authority action in a related case).[3]

IX.

"[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch v. Texas Dep't of Highways and Pub. Transp.,* 483 U.S. 468, 494,

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[3] Neither *United States v. Claxton,* 32 M.J. 159 (C.M.A. 1991), nor *United States v. Tardif,* 57 M.J. 219 (C.A.A.F. 2002), cited by the CCA as support for its action, can carry the weight placed on them. *Claxton* was a waiver case involving sentencing, in which the statement about findings was an obiter dictum; *Tardif* dealt entirely with sentencing.

(1987). "Adherence to precedent promotes stability, predictability, and respect for judicial authority." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Stare decisis applies with "special force in the area of statutory interpretation" because "the legislative power is implicated, and Congress remains free to alter" a court's interpretation. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989), *quoted in Hilton*, 502 U.S. at 202.

For those reasons, we should "not depart from the doctrine of *stare decisis* without some compelling justification." *Hilton*, 502 U.S. at 202. he majority has not provided such compelling justification to jettison *Waymire* and the cases that preceded it.

X.

The majority suggests that the CCA's authority to disapprove a finding that is correct in law and fact is "cabined" but provides scant support for the proposition. *Nerad*, 69 M.J. at 146-47. It hints that the CCA's decision in this case might have been acceptable if it had identified some error—"even error that would not preclude a determination that the finding was correct in law and fact." *Nerad*, 69 M.J. at 147. Such a conclusion guts Article 59(a), UCMJ: "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."

XI.

As the majority opinion announces new law, it is appropriate to consider how this grant of authority to the CCAs may operate.

The majority asserts that the CCAs have "broad," although not unfettered, authority to disapprove a finding that is correct in law. *Nerad*, 69 M.J. at 140. It insists that "the statutory phrase 'should be approved' does not involve a grant of unfettered discretion but instead sets forth a legal standard subject to appellate review." *Id.* at 146 (citing *United States v. Hutchison*, 57 M.J. 231, 234 (C.A.A.F. 2002); *Lacy*, 50 M.J. at 288).

The majority then asserts that for findings the CCAs' authority is "cabined." *Id.* at 146-47. If by "cabined," the majority is applying the "ordinary" meaning of the word—confined within a narrow space or limits, *see Webster's Third New International Dictionary, Unabridged* 309 (2002)—it seems contrary to the characterization of a CCA's sentencing power employed in the cases it cites. In *Hutchison*, 57 M.J. at 234, and *Lacy*, 50 M.J. at 287-88, this Court described a CCA's sentencing authority as a "highly discretionary power" that this court reviews for an abuse of discretion. *See also United States v. Claxton*, 32 M.J. 159, 162 (C.M.A.1991) ("A clearer *carte blanche* to do justice would be difficult to express.").

Whether the majority's legal standard is "cabined" or highly discretionary, in the end it

amounts to no standard at all. The majority states that it will accept a CCA's decision to disapprove findings that are correct in law and fact "unless in disapproving the findings the CCA clearly acted without regard to a legal standard or otherwise abused its discretion." *Nerad*, 69 M.J. at 147. It suggests that it might have upheld the CCA's judgment if it had (1) identified some rationale or error, even a harmless one, or (2) identified some "tangible factors" leading it to conclude that the finding of guilty "unreasonably exaggerated the criminality of" Appellee's conduct or "caused the charge, albeit lawful," to constitute "an abuse of prosecutorial discretion." *Id.* at 147-48 (citations and brackets omitted).

In fact, what we have done here is to tacitly grant the CCAs a power that Congress withheld even from those creatures of pure equity, the boards for correction of military records: the power to revise the findings of courts-martial simply because a particular CCA panel does not like a particular result, or regards it as "unjust." *See* 10 U.S.C. § 1552(f). I can discern no principled standard by which the CCAs are to implement today's decision or we are to review these actions. The CCAs, limited only by their own sense of judicial restraint—the measure of their own feet—are now free to act as councils of revision. Thus, despite protestations to the contrary, the majority's decision grants equitable power to the CCAs.

The majority's decision is unsupported by *Jackson v. Taylor* and our case law, is not compelled

by the language of Article 66, UCMJ, and is a result surely not intended by Congress. As the CCA found Appellee's guilty plea to be correct in law and fact, I believe its decision to set aside the conviction for possession of child pornography exceeded its statutory authority and was without effect. I would order the conviction reinstated.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 09-5006/AF

United States, Appellant

v.

Michael T. NERAD, Appellee
CCA 36994

September 16, 2009

On consideration of Appellee's motion to dismiss certificate for review for lack of jurisdiction to act on the findings set aside by the challenged ruling or, in the alternative, to summarily affirm, the motion filed by Government Appellate Division, U.S. Army, for leave to file brief on behalf of amicus curiae, the motions filed by National Institute of Military Justice for leave to file and extend deadline for filing amicus curiae brief and for leave to participate in oral argument, and Appellant's motion for leave to file a response to National Institute of Military Justice's amicus curiae brief and motion for leave to participate in oral argument, it is ordered that Appellee's motion to dismiss certificate for review for lack of jurisdiction to act on the findings set aside by

the challenged ruling or, in the alternative, to summarily affirm, is hereby denied, that the motion filed by Government Appellate Division, U.S. Army, for leave to file brief on behalf of amicus curiae is hereby granted, that the motion filed by National Institute of Military Justice for leave to file and extend deadline for filing amicus curiae brief is hereby granted, that the motion filed by National Institute of Military Justice to participate in oral argument is hereby denied, and that Appellant's motion for leave to file a response to National Institute of Military Justice's amicus curiae brief and motion for leave to participate on oral argument hereby granted.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

APPENDIX C

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHAEL T. NERAD,
United States Air Force

ACM 36994
29 May 2009

67 M.J. 748

Sentence adjudged 07 February 2007 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Gary M. Jackson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 12 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Major Lance J. Wood.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S.

Ward, Major Jeremy S. Weber, and Captain Coretta E. Gray.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with his pleas, the appellant was convicted by a military judge, sitting as a general court-martial, of one specification each of failure to obey a lawful order, wrongful disposition of military property, larceny of military property, sodomy, possession of child pornography, and adultery, in violation of Articles 92, 108, 121, 125, and 134, UCMJ, 10 U.S.C. §§ 892, 908, 921, 925, 934. The adjudged and approved sentence consists of a dishonorable discharge, 12 months confinement, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

The appellant asserts he was subjected to cruel and unusual post-trial punishment, in violation of the Eighth Amendment[1] and Article 55, UCMJ, 10 U.S.C. § 855.[2] Although not raised by the appellant

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[1] U.S. CONST. amend. VIII.

[2] The appellant raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A.1982).

on appeal,[3] this Court also specified the issue of whether, in relation to the appellant's conviction for possession of child pornography, the Court, exercising its mandate under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to approve only such findings and sentence that, in the opinion of the Court, should be approved, has the power, in the interest of justice, to set aside a finding of guilty that is otherwise determined to be correct in law and fact. For the reasons set forth below, we find the appellant was not subjected to cruel and unusual punishment. However, we answer the specified issue in the affirmative, set aside the conviction for possession of child pornography, and reassess the sentence.

Cruel and Unusual Punishment

We review claims of cruel and unusual post-trial punishment de novo. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007); *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007). Absent evidence that the appellant has been subjected to one or more of certain enumerated punishments specifically prohibited by Article 55, UCMJ, we apply the same standard to claims of Eighth Amendment and Article

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[3] Although the appellant did not raise this issue on appeal, his post-trial submissions to the convening authority asked that the convening authority not approve the finding of guilty to possession of child pornography, for reasons similar to those enunciated in this opinion.

55, UCMJ violations. *Pena*, 64 M.J. at 265.[4] To prevail, the appellant "must show: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [his] health and safety; and (3) that he 'has exhausted the prisoner-grievance system [and] petitioned for relief under Article 138, UCMJ, 10 [U.S.C.] § 938.'" *United States v. Lovett*, 63 M.J. 211, 216 (C.A.A.F. 2006) (footnotes and citations omitted).

The appellant's claim arises from his post-trial stay in a local civilian confinement facility, the Burlington County Jail, Mount Holly, New Jersey, and is supported by a personal affidavit. According to the appellant, he was held at the Burlington County facility for 23 days before being transferred to a military facility.[5] During that time, the appellant avers he was:

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[4] In addition to prohibiting "cruel or unusual punishment," Article 55, UCMJ, 10 U.S.C. § 855, prohibits "[p]unishment by flogging or by branding, marking, or tattooing" and "the use of irons ... except for the purpose of safe custody." None of the specific prohibitions are at issue here.

[5] A letter submitted by the government from the Burlington County Corrections Department indicates the appellant was confined at the county facility for 21 days. Without deciding, we assume for purposes of our evaluation that the greater time period asserted by the appellant is accurate.

1. Housed in a two-person cell with two other inmates, leaving nearly no room to move around;

2. Forced to sleep on a mat on the floor, in front of and touching the toilet, because both beds were occupied by the other inmates;

3. Denied soap, deodorant, a razor, and toothpaste for 14 days as the result of a prison supply issue;

4. Exposed to second-hand marijuana smoke;

5. Denied a blanket for four days after another inmate stole his and "sold" it for cookies;

6. Denied medical assistance after he was accidentally hit with pepper spray when the guards tried to break up a fight between other inmates; and,

7. Denied a crutch, pain medication, and physical therapy for a documented back problem, causing him "severe daily pain." Lack of a crutch also denied him access to the gym, library, and other unspecified activities afforded other prisoners because he could not use stairs without it.

In addition, the appellant claims that inmates gave haircuts to other inmates without cleaning the razor between haircuts. However, the appellant does not state whether or not he personally had his hair cut in that manner.

Setting aside, for the moment, the two medical treatment concerns, none of the other conditions enumerated by the appellant constitute cruel and unusual punishment under the standards established by our superior courts. While such conditions may very well have made the appellant less comfortable than he might have liked, neither the Eighth Amendment nor Article 55, UCMJ, mandate "comfortable prisons." *Farmer v. Brennan,* 511 U.S. 825, 837 (1994) (quoting *Rhodes v. Chapman,* 452 U.S. 337, 349 (1981)); *see also Pena,* 64 M.J. at 265. Rather, the challenged conditions must constitute "objectively, sufficiently serious act[s] or omission[s]" that resulted in "an excessive risk to inmate health or safety" knowingly disregarded by prison officials. *Lovett,* 63 M.J. at 215-16 (quoting *Brennan,* 511 U.S. at 837). Accepting the appellant's assertions at face value, the conditions he describes simply do not rise to that level.[6]

Turning to the asserted medical concerns, we note that "[d]enial of adequate medical attention can constitute an Eighth Amendment or Article 55[, UCMJ,] violation." *United States v. White,* 54 M.J. 469, 474 (C.A.A.F.2001) (citing *United States v. Sanchez,* 53 M.J. 393, 396 (C.A.A.F. 2000)). However, medical care provided to inmates need only be reasonable, not "perfect" or "the best

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[6] We assume, without deciding, that the appellant's description of the living conditions and his treatment at the Burlington County Jail is accurate.

obtainable." *Id.* at 475 (quoting *Harris v. Thigpen*, 941 F.2d 1495, 1510 (11th Cir.1991)).

The appellant has not met his burden of establishing that he was denied reasonable medical care. With regard to the pepper spray incident, the appellant avers only that he was accidentally sprayed and was not offered medical assistance. He has provided no evidence, or even asserted, that he was physically injured by the spray or required medical treatment. With regard to treatment of the appellant's asserted back problem, the DD Form 2707, *Confinement Order*, included in the record of trial indicates that at the time he entered confinement, he was being treated for sciatica and was using a crutch. Although the appellant avers he also had a "documented" need for pain medication (Percocet), he has provided no such documentation and it is not included on the confinement order. However, even accepting at face value the appellant's assertion that he had been prescribed such medication at the time he entered confinement, he does not prevail on this issue. It is clear from the appellant's own affidavit that the decision to discontinue the pain medication and use of the crutch was made by the medical staff at the Burlington County Jail. Although it is evident the appellant found that change in his medical regimen objectionable, he has provided no evidence that such medical determination was unreasonable.

Having concluded that the conditions complained of by the appellant did not constitute cruel or unusual treatment, we need not address whether or

not he exhausted his administrative remedies before seeking judicial redress.

Child Pornography

The adultery, sodomy, child pornography, and Article 92, UCMJ, offenses all arose out of the appellant's love affair with a 17-year-old. During the course of that relationship, the appellant's paramour sent him, via the Internet, several nude or partially nude pictures of herself, including a video clip in which she is naked. The appellant, with his girlfriend's knowledge and consent, also took some nude pictures of her, including some depicting the couple engaged in a sex act. The appellant did not distribute the pictures to others, but simply retained them on his home computer, where they were found after his wife reported the adulterous affair. Because the appellant's girlfriend was 17 at the time the pictures were taken, the appellant's possession of the images was technically in violation of the prohibitions on child pornography, for which purposes a "minor" is anyone under the age of 18. 18 U.S.C. § 2256(1). Thus, the appellant was in the unique position of having a relationship with someone he could legally see naked and, but for his existing marriage, legally have sex with, but could not legally possess nude pictures of her that she took and sent to him.[7] Having considered the entire

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[7] We note that other than as a matter of adultery because of his existing marriage, the relationship between the appellant and his paramour was not a crime under Canadian law or the law of the State of

record, we conclude that the appellant's possession of the photos under these circumstances is not the sort of conduct which warrants criminal prosecution for possessing child pornography and that this conviction unreasonably exaggerates the criminality of his conduct. The question is whether we can set aside the conviction on that basis alone, even though we find no legal error and the appellant never raised an issue at trial, pleading guilty to that offense. The government, in response to the specified issue, unconvincingly argues that neither the plain language of the statute, its legislative history, nor case precedent indicates the Court can set aside a finding of guilty that is found correct in law and fact. We disagree on all points.

Article 66(c), UCMJ, provides that this Court "may affirm only such *findings of guilty* and the sentence or such part or amount of the sentence, as it finds correct in law and fact *and determines,* on the basis of the entire record, *should* be approved." (Emphasis added). The plain language of this provision effectively establishes a

> three-pronged constraint on [our] authority to affirm. [To affirm the findings and sentence, we] must be satisfied that the *findings* and sentence are (1) "correct in law," and (2) "correct in fact." [However, e]ven if these first two prongs are satisfied, the [C]ourt may affirm only so much of the

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New York, where their liaisons occurred, or under the UCMJ.

> *findings* and sentence as "[we determine], on the basis of the entire record, *should* be approved."

United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002) (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998)) (emphasis added). Thus, it is clear that we can overturn a finding or sentence, even if it is correct in law and fact, if we find that it should *not* be approved. Further, while our power to overturn a finding or sentence based on an error of law is limited by the Article 59(a), UCMJ, 10 U.S.C. § 859(a), requirement that the error materially prejudice a substantial right of the accused, that limitation does not apply to prongs two and three. *Id.* "A clearer *carte blanche* to do justice would be difficult to express." *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991) (citations omitted). "If the Court ..., in the interest of justice, determines that a certain finding or sentence should not be approved ... the [C]ourt need not approve such finding or sentence." *Id.* While most cases that have addressed this power have done so within the context of sentence appropriateness determinations, the plain language of the statute, and the quoted decisions, make clear that it is not limited to that application.

The legislative history of Article 66, UCMJ, also supports this Court's broad authority to overturn a finding or sentence, even in the absence of legal or factual error. The current language of Article 66(c), UCMJ, is virtually identical to the original version enacted as part of the Uniform Code of Military

Justice in 1950. 10 U.S.C. § 866(c) (originally enacted in Pub.L. No. 81-506, art. 66(c), 64 Stat. 107, 128 (1950)). Formal committee reports on the then new UCMJ directly addressed only the power of the boards of review to set aside all or part of a sentence if they deemed it "inappropriate." S. REP. NO. 81-486 (1949); H.R. REP. NO. 81-491 (1949). However, it is clear from the hearings on the proposed legislation that some commentators recognized the broad authority the same provision gave the boards of review to overturn findings even in the absence of legal error, and specifically advised Congress of such. In this regard, Major General (Maj Gen) Kenneth F. Cramer, Chief, National Guard Bureau, in a statement presented to Congress by Maj Gen Raymond H. Fleming, observed that under the new Article 66, UCMJ, provision, the "boards of review are to be given extremely wide discretionary powers which will enable them to overrule, with or without legal reasons, the actions of courts and of all appointing authorities." *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H.R. Comm. On Armed Services,* 81st Cong. 772 (1949). The Judge Advocate General of the Army, Maj Gen Thomas H. Green, made the same point in hearings before the Senate. In a prepared statement, Maj Gen Green complained that the Article 66(c), UCMJ, language currently at issue here

> authorizes [the boards of review] to consider other than legal matters in determining what part of a finding or the sentence should be approved. For example, a board may

> consider that a given order which an accused is charged with having violated is unwise, and that therefore, on the basis of the entire record, a finding should be disapproved. This makes possible an unwarranted invasion of the command prerogative and would authorize the board of review to substitute its judgment on military policy for that of the commander in the field. This determination under the proposed bill would be absolutely final. I could not appeal that case to the Court of Military Appeals because the board's determination would not be based on a question of law.

Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before a Subcomm. of the S. Comm. on Armed Services, 81st Cong. 258 (1949).

In response to questions by members of the Senate committee, Maj Gen Green reiterated that the language of Article 66(c), UCMJ, "would give the board of review ... the power to determine whether or not the findings and sentence are appropriate." *Id.* at 263. Based on those concerns, Maj Gen Green proposed substantial revisions to the version of Article 66(c), UCMJ, which, if adopted, would have sharply curtailed the power of the boards of review to overturn findings. *Id.* at 263-64. Congress did not adopt those changes, but enacted Article 66(c), UCMJ, in the form proposed, which remains essentially unchanged to this day. Having found that we have the power to overturn the appellant's conviction for possession of child pornography even

in the absence of legal or factual error, we determine to do so here.

As previously noted, we find that under the unique circumstances of this case, the charge of possession of child pornography to which the appellant pled and was found guilty, though technically accurate, unreasonably exaggerates the criminality of the appellant's actions. That is particularly true given the fact that a conviction for child pornography would require that the appellant to register as a sex offender and the significant consequences of such registration, including the restrictions common to most states on where those registered may reside within any given community.

Based on the unique facts of this case, as set forth in the record, considering the profound implications of a conviction of possession of child pornography, and relying on the broad mandate provided this Court by Congress under Article 66(c), UCMJ, we determine that the appellant's conviction for possession of child pornography should not be approved. Accordingly, the finding of guilty to Specification 1 of Charge VI is set aside and dismissed.

Sentence Reassessment

Having set aside the finding of guilty to the possession of child pornography offense, we must determine whether a rehearing on sentence is required. If we can determine to our satisfaction that, absent the finding of guilty to Specification 1 of

Charge VI, the military judge would have adjudged a sentence of at least a certain severity, we may reassess the sentence. *United States v. Moffeit,* 63 M.J. 40, 41 (C.A.A.F. 2006) (citing *United States v. Sales,* 22 M.J. 305, 308 (C.M.A. 1986)). Applying this analysis, and after careful consideration of the entire record, we are satisfied beyond a reasonable doubt that, in the absence of Specification 1 of Charge VI, the military judge would still have adjudged the same sentence, and so reassess the sentence accordingly. By far the most serious of the appellant's conduct was his larceny and wrongful disposition of military property, followed, to a lesser extent, by the adultery and Article 92, UCMJ, offenses. Within the unique circumstances of this case, the appellant's possession of what was technically child pornography was merely incidental to the adulterous relationship.

Conclusion

The findings, as amended, and the sentence, as reassessed, are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as amended, and the sentence, as reassessed, are

AFFIRMED.

APPENDIX D

UNITED STATES AIR FORCE COURT OF CRIMNAL APPEALS

United States,
Appellee
v.

Senior Airman (E-4)
MICHAEL T. NERAD, USAF,
Appellant

ACM 36994

ORDER

Panel No. 3

On 26 June 2009, counsel for the United States filed a Motion for Reconsideration and Reconsideration *En Banc* of the Court's 29 May 2009 decision setting aside the appellant's conviction for possession of child pornography. *United States v. Nerad*, ___ M.J. ___ (A.F. Ct. Crim. App.).

On 26 June 2009, counsel for the United States filed a Motion for Oral Argument.

On 29 June 2009, counsel for the United States filed a Motion for Leave to File Corrected Copy of

Motion for Reconsideration and Reconsideration E*n Banc*.

On 2 July 2009, counsel for the appellant moved the court to return the United States motion without action for failure to comply with Rule 15(a) of this Court's Rules of Practice and Procedure, which specifies in part that references to matters contained in the record must be properly annotated to reflect the page numbers and exhibits from which they are draw.

Accordingly, it is by the Court on this 6th day of July, 2009,

ORDERED:

That the United States' Motion for Leave to File Corrected Copy of Motion for Reconsideration and Reconsideration En Banc is hereby **GRANTED**.

That the United States' Motion for Oral Argument is hereby **DENIED**.

That the United States' Motion for Reconsideration and Reconsideration *En Banc* is hereby **DENIED**.

That the appellant's Motion to Return the Motion for Reconsideration on Behalf of United States Due to Non-Compliance with this Court's Rules is DENIED as moot.

APPENDIX E

10 U.S.C. §866, Article 66, UCMJ, Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-

conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals.

If the Court of Appeals for the Armed Forces has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

10 U.S.C. §867, Article 67, UCMJ, Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has

been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to

be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.